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Supreme Court of the United States

OCTOBER TERM 1975

No. 75- 870

FORD MOTOR COMPANY,
Appellant,

v.

WILLIAM T. COLEMAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Ford Motor Company ("Ford"), the appellant, appeals from an order entered September 22, 1975 by the United States District Court for the District of Columbia. By that order the three-judge Court denied (one judge dissenting) Ford's motion to enjoin the civil penalty provisions of the National Traffic and Motor Safety Act of 1966, 80 Stat. 718, as amended by the Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 1470, 15 U.S.C. §§1381 *et seq.* (the "Traffic Act"), on grounds of their unconstitutionality. Ford respectfully submits this Jurisdictional Statement to show that this Court has jurisdiction of the appeal, that substantial federal questions are presented under the due process clause of the Fifth Amendment of the United States Constitution, and that Ford is entitled to plenary review of the judgment below.

OPINIONS BELOW

The majority and dissenting opinions of the United States District Court for the District of Columbia are not yet reported. The District Court's opinions and order are set forth in the Appendix (App. 1a). A further order entered *sua sponte* December 1, 1975, amending the majority opinion, is also set forth in the Appendix (App. 51a).

JURISDICTION

This is a direct appeal pursuant to 28 U.S.C. §1253 from an order denying, after notice and hearing, interlocutory and permanent injunctions in a civil action required by 28 U.S.C. §2282 to be heard and determined by a District Court of three judges. By its suit Ford seeks interlocutory and permanent injunctions restraining, on grounds of their repugnancy to the due process clause of the Fifth Amendment of the United States Constitution, the enforcement, operation and execution of the penalty provisions in Sections 108, 109, 152, and 155(c) of the National Traffic and Motor Vehicle Safety Act, as amended, 15 U.S.C. §§1397, 1398, 1412, 1415(c). The judgment of the District Court was entered September 22, 1975. Ford filed its notice of appeal in that Court on October 21, 1975 (App. 53a). This Court's jurisdiction to review the order of the District Court is conferred by 28 U.S.C. §1253; see, *e.g.*, *Schneider* v. *Smith*, 390 U. S. 17, 22 (1968); *Zemel* v. *Rusk*, 381 U. S. 1, 5-7 (1965).

QUESTIONS PRESENTED

1. Whether on their face and as construed by the District Court, Sections 108, 109, 152, and 155(c) of the National Traffic and Motor Vehicle Safety Act, as amended (15 U.S.C. §§1397, 1398, 1412, 1415(c)) deny due process by threatening the imposition of civil penalties in an amount up to $800,000

upon any manufacturer subject to the Act, solely because that manufacturer insists upon a court test of the validity of an administrative directive, arrived at without fair hearing, to recall and to repair motor vehicles at the manufacturer's cost?

2. Whether, on its face, Section 155(c) of the Traffic Act (15 U.S.C. §1415(c)) denies due process by threatening to impose an *additional* civil penalty in an amount up to $800,000 upon any manufacturer subject to the Act who, having insisted upon a court test of the Administrator's directive, refuses to distribute to automobile owners during the pendency of the suit a "provisional notification" informing them of the agency's determination that the automobile contains a defect?

3. Whether, taken as a whole, Sections 108, 109, 152, and 155(c) of the Traffic Act (15 U.S.C. §§1397, 1398, 1412, 1415(c)) deny due process, (a) by permitting the agency to issue directives to recall and to repair motor vehicles notwithstanding the absence both of procedures for a fair hearing and of guidelines, standards, or criteria to govern the agency's decision, and (b) by exposing any person who seeks a judicial hearing on the validity of the agency's directive (i) to a civil penalty in an amount up to $800,000 simply for disputing the agency directive, and (ii) to a separate civil penalty of up to another $800,000 for declining to send to automobile owners a "provisional notification" of the agency order during the pendency of suit, which penalty may be imposed upon the manufacturer even if he ultimately wins the case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution and Sections 108, 109, 152, and 155 of the Act (15 U.S.C. §§1397, 1398, 1412, 1415) are set forth in the Appendix (App. 57a).

STATEMENT OF THE CASE

Ford's appeal presents the first challenge before this Court to the constitutionality of the civil-penalty sections of the National Motor Vehicle and Traffic Safety Act of 1966, as amended (15 U.S.C. §§1381 *et seq.*) (the "Traffic Act"). The issues presented are of substantial and recurring importance in the administration of the Traffic Act.

At issue are those sections of the Traffic Act which impose penalties of up to $1.6 million upon persons subject to the Act who decline to acquiesce in administrative directives of the National Highway Traffic Safety Administration ("NHTSA") of the United States Department of Transportation. These directives, rendered without a due-process hearing, require manufacturers subject to the Traffic Act to recall and repair motor vehicles, at expenses often running into the millions of dollars. Manufacturers which seek a judicial hearing before being required to embark upon recalls of motor vehicles they believe unjustified are confronted with the penalty scheme which is the subject of this appeal. That penalty scheme is not imposed upon the manufacturer that produces a vehicle requiring recall and repair; rather, it reflects the deliberate intent of Congress to expose any manufacturer that decides upon a court test of the agency directive to "the risk of facing an enforcement proceeding . . . and incurring a civil penalty. . . ."

Introductory Statement

By order of August 12, 1975, after an investigation conducted sporadically over a six-year period, the Administrator of NHTSA ordered Ford to recall 1968 and 1969 model year Mustangs and Cougars and to replace certain seat pins in each car, at a cost which Ford estimated to be as high as $19 million. Believing that directive erroneous, Ford declined to obey it, and instead has put the Government to its proof in a *de novo*

enforcement action now pending in the United States District Court for the District of Columbia. As a direct result, Ford is now exposed to civil penalties in that action in an amount up to $1.6 million—simply because it has insisted upon a judicial hearing before complying with an agency directive arrived at without a fair hearing and lacking in the most basic requirements of due process.

On its face, as enforced by the appellees,[1] and as construed by the majority of the three-judge District Court, the Traffic Act does the following:

- *First,* it empowers the NHTSA to order a manufacturer—without fair hearing—to recall and repair hundreds of thousands of motor vehicles at the manufacturer's own cost, running into the millions of dollars.
- *Second,* it exposes the manufacturer to a penalty of up to $800,000 because it seeks a court test of the validity of the agency order prior to its enforcement.
- *Third,* in the event the manufacturer exercises its right to that judicial hearing, the Act further empowers the agency to require the manufacturer to send to owners of the cars in question a "provisional notification" of the Administrator's determination. According to the Government, failure to comply with that order subjects the manufacturer to the risk of a *separate* penalty of $800,000—even if the manufacturer ultimately wins the case.

Ford does not seek to nullify the substantive provisions of the Traffic Act. Nor has Ford sought to restrain the Government from bringing a suit under the Act to compel compliance with

[1] The appellees here (defendants below) are William T. Coleman, Secretary of Transportation; Dr. James B. Gregory, NHTSA's Administrator; Edward H. Levi, Attorney General of the United States; and the United States.

the Administrator's directive; indeed, the Government has already commenced that suit.[2] Rather, by its present complaint Ford seeks only to restrain the operation of the civil penalty provisions of the Act—provisions which have no purpose other than to coerce manufacturers subject to the Act into forgoing their right to judicial review of NHTSA orders, even though those orders issue without due process of law.

The Agency Proceeding

From time to time over the past eight years, seat pins on the inboard sides of the front seats of 1968 and 1969 model year Mustang and Cougar automobiles have broken. Six years ago, the NHTSA opened an inquiry into the seat pin breakages. Subsequently the agency placed its investigation in "inactive status," because breakages were not causing any appreciable number of accidents. The agency later reopened its investigation and ultimately notified Ford by letter dated March 13, 1975 that it had "initially determined" that a defect relating to "motor vehicle safety" existed with respect to the seat pins in the automobiles. Under the Traffic Act, "motor vehicle safety" means "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur. . . ."[3] In support of its initial determination, the agency merely referred Ford to an undifferentiated collection of materials in its files. There were no claims of fatality or serious injury resulting from accidents allegedly attributable to seat pin breakage.

[2] *United States* v. *Ford Motor Co.*, C. A. No. 75-1345 (D.D.C.).

[3] Act, Section 102(1) (15 U.S.C. §1391(1)); *see United States* v. *General Motors Corp.*, 518 F.2d 420, 432 (D. C. Cir. 1975); *United States* v. *General Motors Corp.*, 65 F.R.D. 115, 118 (D.D.C. 1974).

On April 22, 1975, at a "public proceeding" convened by NHTSA, Ford presented the following facts: Approximately 765,000 of the vehicles were sold in the United States. By the time of the "public proceeding," those vehicles had been in operation some six to eight years and had traveled an aggregate of about 50 billion miles. Yet, the NHTSA files—consisting mainly of Ford's extensive submissions to the agency from its own records—contained only 18 complaints involving claims of injury attributable to seat pin breakage, including claims of "minor bruises."[4] In addition, there had been only five claims of damage to property.[5]

The NHTSA staff presented no sworn testimony in response to Ford's presentation. Not one complainant was called to testify. Ford was denied the opportunity to cross-examine any witnesses against it. Under the agency's rules, Ford had no right to subpoena adverse parties, or any other person to give testimony on its behalf. Ford duly noted its objections to the inadequate procedural safeguards before the agency.[6]

Subsequently, by letter to Ford dated August 12, 1975, appellee Gregory, the Administrator of NHTSA, without addressing the facts and contentions advanced by Ford at the "public meeting," notified Ford that he had "finally determined" that a defect relating to motor vehicle safety existed with respect to the seat pins in the automobiles. By that letter, Ford was directed (i) to mail a notice of the Administrator's final determination to all owners of the approximately 625,000 automobiles then estimated still to be in use in the United States—a mailing which would cost Ford in excess of

[4] At least two, and possibly as many as five, of those complaints involved cars which were not even moving at the time of the alleged incidents.

[5] As of August 12, 1975 (the date of appellee Gregory's final directive to Ford), there was a total of 20 complaints of injury—generally of a minor nature—and six complaints of property damage allegedly attributable to seat pin failures.

[6] This preclusion of a due process hearing is not in conflict with the legislative intent. *See* H. R. Rep. No. 93-1452, 93d Cong., 2d Sess., at 24 (1974).

$500,000,[7] and (ii) to replace the seat pins, free of charge to the owners, at a cost estimated by Ford of up to $19 million.

The Administrator's letter to Ford was conclusory in nature. The Administrator made no subsidiary findings and gave no reasons for his decision. Neither the letter nor the NHTSA regulations indicated what guidelines, standards, or criteria governed the agency's determination that, notwithstanding the 50-billion mile history of those vehicles, broken seat pins are somehow so hazardous to the driving public as to warrant invocation of the remedies of the Traffic Act.[8]

On August 18, 1975—six days following receipt of the Administrator's directive in this case—Ford brought the instant suit for injunctive and declaratory relief in the United States District Court for the District of Columbia challenging the constitutionality of the civil-penalty provisions of the Traffic Act.

The Statutory Scheme

The term "unreasonable risk" is the keystone of the substantive obligation of manufacturers under the Traffic Act to recall motor vehicles and repair defects deemed "safety-related" by the NHTSA Administrator. Yet, nearly a decade after passage of the Traffic Act, that key term remains undefined—whether by statute, regulation, or administrative decision. NHTSA concedes it has no standards, guidelines, or criteria governing its defect "determinations." Thus, at the end of an administrative proceeding lacking the fundamentals of a fair hearing,

[7] The contents of the notice are governed by Section 153 (15 U.S.C. §1413), which requires the manufacturer to advise car owners of the existence of the defect, the risk to safety which the Administrator claims the defect involves, and the manufacturer's program to remedy the defect free-of-charge to the car owner.

[8] The absence of any "statement of reasons and basis for the findings of a safety-related defect" also comports with the legislative understanding. *See* H. R. Rep. No. 93-1432, 93d Cong., 2d Sess., at 23-24 (1974).

the manufacturer is confronted with an order to obey an unexplained directive—a directive predicated upon an undefined statutory mandate which in practice leaves the Administrator free to act with unfettered discretion.

If the manufacturer declines to comply with the Administrator's order to recall and repair cars, the Government will institute—as it has here—an enforcement and penalty proceeding in an appropriate federal district court under Section 155(a) of the Act (15 U.S.C. §1415(a)). That enforcement proceeding supposedly affords "the manufacturer a trial *de novo* with the burden of proof on the Government to establish the existence of a safety-related defect." *United States* v. *General Motors Corp., supra,* 518 F.2d, at 426 (footnote omitted).[9] But the right to that "*de novo*" proceeding is beset with two categories of civil penalties to be imposed upon the manufacturer that insists upon such a court test of the Administrator's directive. *First,* Sections 108 and 109 (15 U.S.C. §§1397, 1398) expose the manufacturer to a civil penalty in an amount up to $800,000 for refusing to comply with the Administrator's directive and invoking its right to a judicial hearing.[10] It merits emphasis that the penalty is not imposed because the manufacturer has produced a vehicle containing a defect; no penalty may be imposed upon the manufacturer that acquiesces in the agency directive. Rather, the penalty is assessed only against the manufacturer that challenges the validity of the directive. It is beyond dispute that the penalty provision is designed to coerce the manufacturer into acquiescing in the Administrator's directive and forgoing its right to a court test of the validity of the directive.

The manufacturer that goes to court can avoid exposure to the penalty (i) by winning the case, or (ii) by prevailing on a

[9] *See also United States* v. *General Motors Corp.*, 377 F. Supp. 242, 250 (D.D.C. 1974); *General Motors Corp.* v. *Volpe,* 321 F. Supp. 1112, 1125-26 (D. Del. 1970), *aff'd as modified,* 457 F. 2d 922 (3d Cir. 1972); H.R. Rep. No. 93-1191, 93d Cong., 2d Sess., at 17 (1974).

[10] The penalty provision enacted in 1974 doubles the penalty which had theretofore applied.

motion, made pursuant to Section 155(c)(1) of the Act (15 U.S.C. §1415(c)(1)), to restrain enforcement of the agency order. However, the injunction provisions forbid the court to restrain the NHTSA order *pendente lite* unless the court determines *both* (i) that the manufacturer has demonstrated it is likely to prevail on the merits, *and* (ii) that the manufacturer's failure to furnish notification is reasonable.

Second, even if the enforcement court grants the manufacturer's motion for a stay of the penalties *pendente lite*, the Administrator may nevertheless order that a so-called "provisional notification" of the defect be sent to the car owners at any time during pendency of the suit. If the manufacturer refuses to comply with the directive to send that provisional notification, the Administrator, according to the Government, can demand an *additional* penalty of up to $800,000—even if the manufacturer wins its preliminary injunction motion, and even goes on to win the lawsuit on the merits.

Thus, under the 1974 amendments to the Traffic Act, the manufacturer must make a basic decision whenever it receives a recall and repair directive from NHTSA: (i) it can yield to the Administrator's order, arrived at without due process, and thereby incur millions of dollars in costs for a recall campaign which it believes in good faith—as Ford does here—to be unjustified; or (ii) it may obtain its day in court by defending an enforcement suit brought by the Government—but only at the risk of incurring penalties of up to $1.6 million.

We are aware of no other statutory scheme which has gone so far as this—to sanction an administrative proceeding—lacking in due process, and to impose the prospect of immense penalties as the cost of a court test of the agency directive emanating from that proceeding.

The Proceedings and Decision Below

On the day Ford filed its suit, Judge Hart granted a temporary restraining order and convened a District Court of

three judges to hear Ford's constitutional claims.[11] Argument was had August 28, 1975.

On September 22, 1975, the three-judge Court (Judge Hart dissenting) declared the civil-penalty provisions of the Traffic Act not repugnant to the due process clause of the Fifth Amendment and denied Ford's motion to enjoin preliminarily the operation, execution, and enforcement of those provisions. Writing for himself and Judge Parker, Circuit Judge Leventhal concluded that the challenged provisions could be sustained by construing the Act to permit "the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction [under Section 155(c)(1) of the Act] . . . in the Government's enforcement suit" (App. 11a). Nonetheless, the Court also concluded that Ford, in order to free itself from the threat of the penalties, would have to go further and show at least that the Government was unlikely to prevail on the merits (App. 21a). The Court declined to consider Ford's challenge to the second $800,000 penalty, arising under the "provisional notification" procedure, because the Administrator had not yet ordered such notification in this case (App. 10a-11a).[12]

Judge Hart, dissenting, would have granted Ford's motion for an injunction against the enforcement of the Act's penalty provisions on grounds of their unconstitutionality. He concluded that the penalty for refusing to acquiesce in the Administrator's final determination "must of necessity create an apprehension in the mind of the manufacturer that indeed chills his access to the courts for he knows that the penalty for losing

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[11] Also on August 18, 1975, the United States brought suit to enforce the Administrator's directive. *United States* v. *Ford Motor Co.*, *supra* at *n.2*.

[12] In the exercise of its "pendent jurisdiction," the District Court granted an injunction "restraining the operation of the statutory penalties," pending a determination of Ford's motion for a restraining order under Section 155(c)(1) in the Government's enforcement case (App. 1a). That motion is now pending before the District Court *(ibid.)*. The three-judge court further ordered itself dissolved, thereby terminating Ford's constitutional suit.

the suit may be $800,000" (App. 42a) (footnote omitted). Judge Hart would also have invalidated the second penalty, imposed for failure to send out the "provisional notification," because that provision "imposes civil penalties solely on the basis of an informal administrative proceeding lacking in due process protections, totally untested in a judicial forum" (App. 36a).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE TRAFFIC ACT UNCONSTITUTIONALLY IMPOSES A CIVIL PENALTY DESIGNED TO DETER A PARTY FROM SEEKING JUDICIAL REVIEW OF AN AGENCY ORDER ARRIVED AT WITHOUT A DUE-PROCESS HEARING

The principle of law which controls this case has been followed in an unbroken series of decisions by this Court extending over half a century. No matter how a statute may provide for the enforcement of administrative orders,

> "the right to a judicial review must be *substantial, adequate and safely available*—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley So. Ry.* v. *Georgia*, 235 U. S. 651, 661 (1915) (emphasis supplied).

As this Court has held in the analogous context of legislative rate-making:

> "[T]he imposition of severe penalties as means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for *safely testing, in an appropriate judicial proceeding*, the validity of the rate . . . *before any liability for the penalties attaches. . . .*" *St. Louis, I.M. & So. Ry.* v. *Williams*, 251 U. S. 63, 64-65 (1919) (emphasis supplied).[13]

The foregoing principles, long settled by this Court, are breached by Sections 108 and 109 of the Traffic Act (15 U.S.C. §§1397, 1398). Those provisions impose a penalty in an amount up to $800,000 upon the manufacturer which refuses to acquiesce in the Administrator's directive and asks for judicial scrutiny of the directive. As Judge Hart stated in dissent:

> "It is at this initial order stage that the statute first fails to meet Fifth Amendment due process requirements since the manufacturer must either comply with the initial notification and remedy order and thereby expend very substantial sums of money pursuant to an untested agency determination or challenge the determination on the merits in an enforcement action and risk the sanctions of substantial civil penalties if he ultimately loses in that suit" (App. 31a).

The District Court majority recognized the constitutional infirmities lurking in any penalty scheme designed to deter recourse to the courts (App. 3a-4a). The Court below struggled heroically to avoid those infirmities by engrafting a series of procedural innovations onto the Traffic Act. But, for the reasons which follow, we submit that the Court's efforts were insufficient to salvage this novel penalty scheme.

1. The District Court pointed to the provision in the Act for interim restraint of the Administrator's directive upon the enforcement court's determination "(A) that the manufacturer's failure to furnish notification is reasonable, and (B) that

[13] *Accord: Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920) (per Brandeis, J.); *Ex parte Young*, 209 U. S. 123 (1908). *See also St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 225-27 (1961), *aff'g* 285 F. 2d 607 (2d Cir. 1960); *United States* v. *Pacific Coast European Conference*, 451 F. 2d 712 (9th Cir. 1971).

the manufacturer has demonstrated that he is likely to prevail on the merits." Act, Section 155(c)(1) (15 U.S.C. §1415 (c)(1)). According to the District Court, that provision, "fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction" (App. 11a). Thus, the District Court concluded, the Traffic Act satisfies the constitutional requirement of "an adequate opportunity 'for safely testing, in an appropriate judicial proceeding,' the validity of the Administrator's directive"—so long as Ford has " 'reasonable ground to contest' " that order (App. 12a-13a, relying upon *St. Louis, I. M. & So. Ry., supra; Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 338 (1920)).[14]

It is unnecessary to consider whether the District Court correctly stated the appropriate constitutional test. For what the District Court granted with one hand, it took away with the other. In the District Court's view, the manufacturer's ability to obtain the preliminary restraint under Section 155(c)(1) is subject to an important qualification. Even if the manufacturer "comes forward with evidence establishing the substantiality of its objections," the Court said, "the injunction will be denied if the Government meets the burden" of showing at the hearing on the Section 155 preliminary injunction that *it* is likely to prevail at the trial on the merits on the question of a safety-

[14] Consistent with the foregoing reading, the District Court found authority in the Traffic Act to enter a temporary order restraining the operation of the penalties pending the enforcement court's determination of the manufacturer's motion for preliminary injunction. That temporary order would be appropriate, the Court said, "[i]n any case where the manufacturer presents a nonfrivolous question, . . . for the nonfrivolous question shows that 'the failure to furnish [immediate] notification is reasonable,' and the equitable context of the statute establishes power to issue a temporary restraining order until the court has had opportunity to hear and consider the motion for preliminary injunction and opposition thereto" (App. 16a). On that basis—"in compliance with the Act, and not in its teeth" (App. 25a)—the Court issued a restraining order pending the enforcement court's determination of Ford's motion for a preliminary injunction under Section 155(c)(1) (App. 1a).

related defect, "notwithstanding the proof tendered by the manufacturer" (App. 21a).[15] Thereafter, if the preliminary injunction is denied, "the manufacturer may continue to resist compliance, and to litigate, only by shouldering an exposure to an assessment of penalties if it loses on the merits" (App. 21a).

In other words, under the Traffic Act as construed by the District Court, the manufacturer *can* be exposed to the risk of penalties in an amount up to $800,000 as the price of seeking judicial review of a directive issued without a fair hearing even if the manufacturer has a substantial, nonfrivolous case on the merits. It follows that on the District Court's own reading of this Court's holdings, the civil-penalty provisions of Sections 108 and 109 violate due process. For the Traffic Act, as construed and applied below, continues to deny an adequate opportunity to the manufacturer for "safely testing" the validity of the Administrator's order—even where the manufacturer has "reasonable ground to contest" that order. As so interpreted, the civil-penalty provisions of Sections 108 and 109 cannot stand, for they fail to accord the manufacturer a fair "chance . . . for a test of reasonable objections . . . ." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 654 (1950).

2. The District Court conceded that even with the preliminary injunction procedure provided by the Traffic Act, "Ford would have a basis for attacking the statutory scheme if the penalties attached to noncompliance were inflexibly set at an amount 'so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court' " (App. 21a, relying upon *Life & Cas. Co.* v. *McCray*, 291 U. S. 566, 574 (1934)). But the Court thought that the $800,000 penalties here at issue were free from the vice

[15] The Government, the District Court ruled, must adduce proof "sufficiently to overcome the [manufacturer's] claim of mere equipoise" *(ibid.)*—*i.e.*, that "on some item that it is material for the Government to establish, as the party with the [ultimate] burden of proof [on the merits], the court cannot fairly say whether the item or its contrary is the more probable" (App. 19a).

condemned in *McCray* because their assessment under the Traffic Act (i) proceeds on what the Court called a "noncumulative" basis, and (ii) is discretionary with the enforcement court (App. 22a). Neither point can withstand analysis.

First, the supposedly "noncumulative" nature of the penalties under Sections 108 and 109 does not save those provisions. It is true that the penalties are assessed not on a daily basis, but at a maximum of $1000 per vehicle or component involved, with a ceiling of $800,000 for "any related series of violations." Act, Section 109(a) (15 U.S.C. § 1398(a)). However, it makes no practical difference to the affected manufacturer whether the penalties "cumulate" on a per-day or a per-car basis. Both the $1000 per-car and $800,000 overall limits are quickly reached whenever 800 cars are at issue. Moreover, although the District Court minimized the nature of the $800,000 penalty (App. 22a), the fact is that that amount is no small sum even to a company like Ford—much less to smaller companies too intimidated by the prospect of such penalties to undertake a judicial challenge to NHTSA directives.[16] Finally, it is noteworthy that the present $800,000 "maximum" reflects a Congressional *doubling* of the penalty effective December 1974—a legislative action taken as if in response to a District Court

[16] Not only the "big three" car makers, but all manufacturers of vehicles, replacement equipment, and certain items of original equipment, are subject to the penalty scheme sought to be reviewed. Act, Sections 108(a)(1)(D)(ii), 152(a)(2) (15 U.S.C. §§1397(a)(1)(D)(ii), 1412(a)(2)). In addition this is not the only "defect" controversy which Ford has pending before the agency. Further, the $800,000 penalty available under Sections 108 and 109 must be viewed in conjunction with the $800,000 penalty under Section 155(c) of the Act (15 U.S.C. §1415(c)), which the Government contends is *separable from* and *additional to* the first, and which confronts the manufacturer that rejects the Administrator's ultimatum to send out the "provisional notification" during pendency of the suit.

ruling in July of that year that "the assessment of penalties [up to the then-extant ceiling of $400,000] will [not] . . . unduly inhibit General Motors from seeking judicial review . . . ." *United States* v. *General Motors Corp.*, 385 F. Supp. 598, 604 (D.D.C. 1974). At some point the Constitution must intervene to limit the massive size of civil penalties with which Congress may threaten even large companies as the risk they must run to obtain a judicial hearing on the correctness of administrative edicts entered in disregard of due process.

Second, the civil-penalty provisions of the Traffic Act cannot be salvaged on the theory that their assessment is left to the discretion of the enforcement court. Past decisions of this Court—including one heavily relied upon by both the Government and the Court below—demonstrate the contrary.[17] Reliance on the discretionary authority of that court to mitigate penalties at the *end* of the litigation overlooks the point that the manufacturer must assess its situation at the *outset*, when it is considering whether to acquiesce in the Administrator's directive or to insist on its right to a court test of the agency's

[17] In *St. Louis, Iron Mountain & Southern Ry.* v. *Williams*, 251 U. S. 63 (1919), the challenged rate statute subjected railroad companies which collected a fare higher than that prescribed by law to civil penalties of "not less than fifty dollars, nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee," all to be assessed in a private action brought in state court by the aggrieved passenger. 251 U. S., at 64. This Court ruled that "the imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law . . . ." *Ibid.* The saving feature was not the discretionary assessment, but the availability of an "adequate opportunity [to] the carrier for *safely* testing, *in an appropriate judicial proceeding*, the validity of the rate . . . *before any liability for the penalties attaches* . . . ." *Id.*, at 64-65 (emphasis supplied). To satisfy the *St. Louis* criteria, the Traffic Act would have to provide Ford a due process hearing before the Administrator issued his recall directive.

order.[18] That is the perspective from which the Constitution commands that this penalty scheme be evaluated. As Justice Brandeis wrote for a unanimous Court in *Oklahoma Operating Co.* v. *Love, supra*, a penalty regime is invalid which "*might well deter* even the boldest and most confident" litigant from seeking judicial review of an administrative edict arrived at without fair hearing. 252 U. S., at 336 (emphasis supplied).

Judge Hart, in dissent below, put his finger on the nub of the constitutional problem. After discussing the decisions of this Court relied upon by Ford *(see supra* at 13), Judge Hart wrote:

> "The pattern in all of these cases appears from the same loom whose fabric we examine in this case. That pattern consists of a statutory framework designed to deter judicial review of legislative or administrative determinations. It is of little consequence that the sanctions in this case are civil rather than criminal penalties. Nor is it of significant moment that the penalties imposed in this statute are not cumulative on a daily basis. *The penalties in this Act as amended are substantial; they deprive the manufacturers of property; and their purpose is to inhibit judicial review.* This is the common thread which runs through all of these cases and which binds our present case to those precedents. The 'fair price of adventure' is too high, and the argument that automobile manufacturers may be able to afford such

[18] Despite the suggestion of the District Court (App. 22a), it is little consolation to companies like Ford that, in assessing penalties, the enforcement court may take into account, among other things, "the size of the business of the person to be charged. . . ." Act, Section 109(b) (15 U.S.C. §1398(b)).

It is also noteworthy that the administrative agency has announced to Congress its *in terrorem* policy that "whenever an action is forwarded to the Justice Department to collect a civil penalty the maximum authorized by law is sought." Hearings Before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce on H. R. 7505, 93d Cong., 1st Sess. at 388 (1973).

> penalties does not overcome the inevitably chilling effect which the penalty provisions instill" (App. 49a) (footnote omitted) (emphasis supplied).

Here the $800,000 civil penalty with which Ford is threatened under Sections 108 and 109 is sought by the Government *solely* because Ford has exercised its right to ask a federal court to consider the validity of the Administrator's order. The penalty scheme indisputably chills Ford's right to that judicial review—that is its whole point and purpose.[19] As Judge Hart summed up in his dissent:

> "The legacy of *Ex parte Young* is directed against the erection of inhibiting barriers to judicial review of legislative or administrative action in proper federal cases. I do not mean to suggest that safety-related defects in motor vehicles should not be expeditiously rectified; nor do I intimate that the burden of remedy should not fall on the manufacturer. However, expedition must be accomplished through constitutional methods which comport with procedural due process concepts of dealing with property. The penalty scheme accompanying the notification and remedy order in the Act as amended does not meet such Fifth Amendment requirements and I therefore find it unconstitutional" (App. 49a).

II. THE "PROVISIONAL NOTIFICATION" PENALTY IS UNCONSTITUTIONAL ON ITS FACE

Under the 1974 amendments to the Traffic Act, once the Government sues to enforce the NHTSA recall directive, the

[19] The coercive impact of the civil penalty was precisely the result intended by Congress. The House Report on the 1974 Amendments states that "when a manufacturer decides to contest the Secretary's determination of a defect or failure to comply, *he does so at the risk* of facing an enforcement proceeding brought by the Government and *incurring a civil penalty*. . . ." H. R. Rep. No. 93-1191, 93d Cong., 2d Sess., at 18 (1974) (emphasis supplied).

Administrator has further authority under Section 155(b) (15 U.S.C. §1415(b)) to require the manufacturer to send out a "provisional notification" to all vehicle owners advising them of NHTSA's determination, the Administrator's assessment of the risk, the pending Court proceeding, and the manufacturer's duty to remedy the defect without charge should NHTSA prevail in the Court action. In this case, to send out that "provisional notification" not only would cost Ford some $500,000 in locating and notifying present owners, but would also involve Ford's disparagement of its own product on the basis of a judicially untested administrative edict with which Ford disagrees.

Under Section 155(c)(2) (15 U.S.C. §1415(c)(2)), failure to comply with the Administrator's "provisional notification" order exposes the manufacturer, on the Government's reading of the Act, to an *additional* $800,000 penalty—even if the manufacturer has succeeded in securing a preliminary restraint under Section 155(c)(1), and even if it ultimately prevails on the merits (*see* App. 10a, at n.21). The amended Act makes no provision for judicial review of the Administrator's directive to send out the provisional notice.

The District Court declined to consider Ford's challenge to the "provisional notification" penalty on the theory that the Administrator had not yet ordered such notification in this case. The Court characterized the "mere possibility" that the Administrator might exercise his statutory power as "too speculative to warrant judicial consideration at this juncture" (App. 11a). We submit that that ruling was incorrect on two grounds.

1. Contrary to the view of the three-judge Court majority, the impact of the "provisional notification" penalty is far from hypothetical here. The manufacturer who receives a recall directive and then must determine whether to acquiesce or to seek a judicial test, necessarily is forced to take into account that once litigation begins, the Administrator can order the provisional notification at any time, and then demand and

possibly collect *another* $800,000 penalty for noncompliance—even if the Administrator's recall order is ultimately held unlawful. This coercive feature alone undeniably gives the "provisional notification" penalty a present, operative effect which independently deters a manufacturer from seeking judicial review of the agency order. Further, the one statutory predicate to the issuance of the "provisional notification" directive—the commencement of the enforcement suit—is already satisfied here.

In short, the penalty under Section 155(c)(2) is part and parcel of the deterrent system erected by the Traffic Act—it is an integral link in the formidable barrier which the statute throws up against the seeking of judicial review. Judge Hart, dissenting, did "not think it is premature to pass on the validity of the provisional notification provision. The Government has already filed the enforcement action in this court and there is no indication by the Government that it will not seek to invoke the provisional notification requirement of the statute" (App. 36a). Nor has this Court hesitated to consider the impact of similar *in terrorem* provisions in the past—even where the Government has disavowed its intention to invoke them. *E.g., Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 154 (1967).

2. The provisional notification procedure is unconstitutional on its face. It is basic that a respondent before an administrative agency must have a due process hearing on the merits *somewhere* before an order imposing substantive obligations can become operative. The guiding principle is that "the demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding *so long as the requisite hearing is held before the final* [*administrative*] *order becomes effective." Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126, 152-53 (1941) (emphasis supplied).[20] The Traffic Act provides for no

[20] *Accord: Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 598 (1950); *Lichter* v. *United States,* 334 U.S. 742, 791-92 (1948); *United States* v. *Illinois Cent. R.R.,* 291 U.S. 457, 463 (1934).

hearing of any kind—anywhere or at any time—on the provisional notification.[21]

Judge Hart, dissenting below, again aptly summarized the situation:

> "Also predicated on the informal administrative hearing is the provisional notification requirement which, with its concomitant civil penalties, applies regardless of the ultimate disposition of the manufacturer's challenge. The sanctions of up to $800,000 for violation of the provisional notification order are identical to those triggered by violation of the initial notification and remedy order. The manufacturer is at this point deprived of his property without due process for a second time. The manufacturer faces a civil penalty of up to $800,000 for failing to comply with this provisional notification order based on a proceeding which did not adequately permit him to answer and counter charges made by the agency; applied without judicial approval; and imposed whether or not the manufacturer ultimately prevails on the merits. Such a summary action born in an informal proceeding and untouched by the light of judicial review cannot survive tests required by the due process clause of the Fifth Amendment, and so I would hold it unconstitutional" (App. 32a-33a).

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[21] Recent decisions of this Court confirm that due process requires a judicial hearing before any governmentally-sanctioned deprivation of property can take place. As the Court held in *Fuentes* v. *Shevin*, 407 U. S. 67, 81 (1972):

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."

The "root requirement" of due process, the Court said, is that an "individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. . . ." *id.*, at 82 (emphasis in original). *Accord: North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969).

III. THE STATUTORY ENFORCEMENT SCHEME IS INVALID AS A WHOLE

The District Court failed to address Ford's final argument—that the statutory enforcement scheme, viewed as a whole, violates due process. That scheme may be summarized as follows: NHTSA conducts an administrative proceeding at which the manufacturer has neither the right of confrontation, nor the right to compel witnesses in its behalf. That proceeding culminates in an administrative directive allegedly founded upon the statutory criterion of "unreasonableness." The directive is not supported by reasoned findings of fact nor by any statement of the standards employed. In sum, in the words of Judge Hart, the "agency hearing [is] . . . an informal proceeding which [does] . . . not accord the manufacturer the basic incidents of procedural due process and yet subsequently expose[s] . . . the manufacturer to substantial civil penalties as the result of the agency determination derived from the proceeding" (App. 34a).

This concededly deficient administrative process is supposedly cured by a judicial enforcement proceeding called "*de novo.*" In practice, however, the penalty provisions of Sections 108, 109 and 155(c)—which threaten to impose fines aggregating up to $1.6 million upon any manufacturer who dares to go to court—all operate to deter the manufacturer from exercising its supposedly "*de novo*" opportunity to defend itself on the merits. The risk of massive penalties can be avoided only by forgoing judicial review and by acquiescing in an agency order which the manufacturer—and the court as well—may believe to be erroneous.

That is not the end of the matter. The manufacturer's assessment of its chances of ultimate success (or of persuading the enforcement court on the statutory motion for a preliminary

injunction) must also take into account that the statutory scheme is devoid of objective standards. The ultimate statutory criterion is whether the alleged defect gives rise to an "unreasonable" risk of accidents and of death or injury to persons in the event accidents occur. Act, Section 102(1) (15 U.S.C. §1391(1)). Yet neither the Act itself, nor any agency regulation, nor any reasoned decision of the Administrator, gives substance to the statutory mandate. Thus in cases such as this—in which the manufacturer in good faith believes that no unreasonable safety hazard is presented—the manufacturer cannot possibly evaluate the correctness of the Administrator's directive in advance of judicial review.[22]

In sum, the Traffic Act exacts a heavy toll at the courthouse door as the price of the manufacturer's insistence upon judicial review of a naked agency conclusion that an alleged defect poses an "unreasonable" risk—a conclusion founded on procedures violative of due process. The penalty provisions of the Traffic Act, taken as a whole, must be held to violate due process.

CONCLUSION

Whether considered singly or taken as a whole, the civil-penalty provisions of the Traffic Act violate the due process clause of the Fifth Amendment of the United States Constitution. Accordingly, Ford Motor Company respectfully

[22] The applicability of the statutory standard may be obvious for defects which involve a high probability of accidents and ensuing injury or death. However, the applicability of that criterion is far from obvious in such a case as this, which involves a seat pin, particularly given the actual history of a miniscule number of minor accidents out of a universe of over 700,000 cars traveling 50 billion miles in over seven years.

submits, the federal questions presented herein are substantial and warrant this Court's plenary review.

Respectfully submitted,

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December 20, 1975

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD MOTOR COMPANY
Plaintiff,
v.
WILLIAM T. COLEMAN, *et al.,*
Defendants.

Civil Action
No. 75-1340

ORDER

In accordance with the foregoing Memorandum Opinion, it is this 22nd day of September, 1975

DECLARED that the penalty provisions of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718 as amended by the Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 1470, sections 108, 109, 152, and 155(c) are not repugnant to the due process clause of the Fifth Amendment of the United States Constitution; and it is further

ORDERED that plaintiff's Motion for a Preliminary Injunction restraining the operation, enforcement and execution of the aforesaid sections as unconstitutional be and it hereby is denied; and it is further

ORDERED in the exercise of this court's pendent jurisdiction, the court hereby grants an injunction restraining the operation of the statutory penalties, pending a determination by the District Court in Civil Action No. 75-1345 (D.D.C. filed August 18, 1975), the Government's enforcement proceeding, of the Ford Motor Company's Motion for a Preliminary Injunction, if promptly made, this injunction to be subject to the further order of the court in that proceeding; and it is further

ORDERED that the three-judge court convened herein be and it hereby is, dissolved.

Entered: September 22nd, 1975.

HAROLD LEVENTHAL
Harold Leventhal
United States Circuit Judge

I DISSENT:

GEORGE L. HART, JR.
George L. Hart, Jr.
United States District Judge

BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD MOTOR COMPANY

v.

WILLIAM T. COLEMAN
Secretary of Transportation

JAMES B. GREGORY
Administrator of NHTSA

EDWARD H. LEVI
Attorney General of the United States

UNITED STATES OF AMERICA

Civil Action
No. 75-1340

OPINION

Ford Motor Company in this case challenges the constitutionality of §§108(a)(1)(D), 109, 152(a) and 155(b) of the 1974 amendments to the National Traffic and Motor Vehicle Safety Act of 1966, (Act), 15 U.S.C. §§1397 (a)(1)(D), 1398, 1412(a) and 1415(b). It seeks a preliminary injunction in this three-judge district court[1] restraining the operation of the statutory penalties for noncompliance with the order of the National Highway and Traffic Safety Administration (NHTSA) to give notification to purchasers of 1968 and 1969 Mustang and Cougar automobiles and to remedy without charge any seat back pivot pin brackets in those cars.[2] Ford

[1] 28 U.S.C. §2282.

[2] All 1968 and 1969 model Mustang and Cougars are two-door vehicles with folding front seat backs. The brackets which permit the seat to fold forward are welded to the sides of the seat bottom frame; the pivot pins hinge the brackets to the frame allowing the seat back to pivot forward. Failure, resulting from a fracture of the weld, is claimed by the Government to involve potential safety hazards in loss of vehicle control and injury from the rearward collapse of the seat itself. *See* Government Exh. 1, at 5, 29.

seeks a tolling of the penalties until it is able to obtain a judicial determination of the validity of the Administrator's underlying premise that seat pin breakage constitutes "a defect which relates to motor vehicle safety" within the meaning of the Act.[3] Ford maintains that the provision permitting a penalty of $800,000 for noncompliance creates an *in terrorem* atmosphere calculated to deter manufacturers from exercising their right to a *de novo* hearing in district court, and there to require the Government to meet the burden of showing by a preponderance of the evidence, that there exists a safety-related defect.[4] Ford objects to its exposure to penalties for (1) the initial noncompliance, asserting that the statutory procedure for obtaining a stay pending the outcome of the *de novo* district court hearing is constitutionally inadequate because it shifts the burden onto the manufacturer to show that his noncompliance was "reasonable" and that "he is likely to prevail on the merits";[5] and (2) possible future noncompliance with an additional order to give provisional notification, which the Administrator may issue should Ford succeed in staying the operation of the first set of penalties, and which cannot be avoided even if Ford ultimately wins on the merits.[6]

In our view, the proper construction of the Act, taking into account the statutory language, legislative history, and the sound doctrine that calls for interpretation in the light of traditional principles of equity in the federal courts, is consistent

[3] Section 102(1) defines "motor vehicle safety" as protection "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and . . . against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles." 18 U.S.C. §1391(1).

[4] Memorandum of Points and Authorities of Plaintiff in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 19-20.

[5] *Id.* at 14-15, 25; Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction at 4.

[6] *Id.* at 22, 26-30.

with constitutional dictates. In accordance with that construction, and in the exercise of its pendent jurisdiction, this court restrains the operation of the statutory penalties until Ford's motion for a preliminary injunction is ruled on in the Government's enforcement action, which was filed the same day as Ford's complaint, and has been assigned to District Judge Hart as a related case.[7] That injunction is in conformance with the Act, not predicated on the Act's unconstitutionality.

I. STATUTORY FRAMEWORK AND FACTUAL BACKGROUND

Section 152(b), 15 U.S.C. §1412(b) empowers the Administrator, as the Secretary of Transportation's delegate,[8] to require the manufacturer of a motor vehicle "which contains a defect which relates to motor vehicle safety" to furnish notification of the defect to owners, purchasers and dealers and to remedy it without charge. The determination of a safety-related defect is made on the basis of the Administrator's investigation and after an informal hearing at which the manufacturer has "an opportunity to present data, views and arguments" to show the absence of safety-relatedness.[9]

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[7] United States v. Ford Motor Co., Civil Action No. 75-1345 (D.D.C., filed August 18, 1975).

[8] 49 C.F.R. §1.51(a).

[9] Section 152, 15 U.S.C. §1412, provides in relevant part:

(a) If through testing, inspection, investigation, or research carried our pursuant to this chapter, or examination of communications under section 1418(a)(1) of this title, or otherwise, the Secretary determines that any motor vehicle or item of replacement equipment—

(2) contains a defect which relates to motor vehicle safety; he shall immediately notify the manufacturer of such motor vehicle or item of replacement equipment of such determination, and shall publish notice of such determination in the Federal Register. The notification to the manufacturer shall include all information upon which the determination of the Secretary is based. Such notification (including such information) shall be

Noncompliance with a §152(b) order constitutes a violation under §108(a)(1)(D), 15 U.S.C. §1397(a)(1)(D), exposing the manufacturer to a civil penalty under §109, *id.* §1398, not to exceed $1000 for each violation (presumably for each defect-marked motor vehicle) and $800,000 "for any related series of violations." The Secretary determines the amount of the penalty to be sought in light of "the appropriateness of such penalty to the size of the business charged and the gravity of the violation. . . ."[10] But it is the court that determines whether a penalty shall be ordered and in what amount.

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available to any interested person, subject to section 1418(a)(2)(B) of this title. The Secretary shall afford such manufacturer an opportunity to present data, views, and arguments to establish that there is no defect or failure to comply or that the alleged defect does not affect motor vehicle safety; and shall afford other interested persons an opportunity to present data, views, and arguments respecting the determination of the Secretary.

(b) If, after such presentations by the manufacturer and interested persons, the Secretary determines that such vehicle or item of replacement equipment does not comply with an applicable Federal motor vehicle safety standard, or contains a defect which relates to motor vehicle safety, the Secretary shall order the manufacturer (1) to furnish notification respecting such vehicle or item of replacement equipment to owners, purchasers, and dealers in accordance with section 1413 of this title, and (2) to remedy such defect or failure to comply in accordance with section 1411 of this title.

[10] The full text of §109, 15 U.S.C. §1398, provides:

(a) Whoever violates any provision of section 1397 of this title, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 1397 of this title, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or Item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $800,000 for any related series of violations.

(b) Any such civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such

Enforcement takes place in the context of either an action under §110(a), 15 U.S.C. §1399(a), to restrain a violation of the §152(b) order or under §109 to collect a civil penalty with respect to such violation. The enforcement action is to be brought by the Government in the district court for the District of Columbia or for a judicial district in the state of incorporation of the manufacturer. Section 155(a), *id.* §1414, requires expedited consideration and consolidation of "all actions . . . brought with respect to the same order," in accordance with the order of the court in which the first action is brought. During the pendency of an action relating to a §152(b) order, the Secretary may, under §155(b), *id.* §1415(b), order the manufacturer to issue provisional notification of the existence of the defect.[11]

The district court in such an action may hold the manufacturer liable for noncompliance with the §152(b) order only upon finding, after a *de novo* hearing,[12] that the Secretary has

penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

[11] The additional provisional notice would contain a statement of the Secretary's determination of the existence of a safety-related defect, the basis for that determination, his evaluation of the attendant risk to motor vehicle safety and any measures he believes necessary to "avoid an unreasonable hazard resulting from the defect or failure to comply;" a statement that the manufacturer will remedy the defect or failure to comply without charge if he loses on the merits; and other matters the Secretary may prescribe by regulation or order.

[12] In order "to expedite the disposition of safety-related defects and noncompliance matters without violating the constitutional rights of due process," Congress provided for informal procedures at the §152(b) stage, and "due process would be satisfied since there would be a trial *de novo* with the burden of proof on the Government to prove, by a preponderance of the evidence, that a safety-related defect or failure to comply exists" before the manufacturer could be held liable. H. REP. NO. 93-1191, 93d Cong., 2d Sess. 17 (1974). *See* General Motors v. Volpe, 321 F. Supp. 1112, 1126 (D.Del. 1970),

established by a preponderance of the evidence the existence of a defect which relates to motor vehicle safety. Moreover, §155(c)(1), *id.* §1415(c)(1), authorizes the court "to restrain the enforcement of such an order . . . if it determines, (A) that the failure to furnish notification is reasonable, and (B) that the manufacturer has demonstrated that he is likely to prevail on the merits." Liability for noncompliance with a §155(b) provisional notification order, however, attaches regardless of the validity of the underlying §152(b) determination, and no similar stay *pendente lite* procedure is set forth in the Act.[13]

In the case before the court, the Administrator notified Ford on March 13, 1975, that investigation indicated "that the front inboard seat back pivot arm pin bracket on 1968-69 Mustang

aff'd as modified, 457 F.2d 922 (3d Cir. 1972); United States v. General Motors Corp., No. 74-1656 (D.C. Cir. Aug. 4, 1975), slip op. at 1367; United States v. General Motors, 377 F. Supp. 242, 250 (D.D.C. 1974). It should be noted that Congress expected the district court conducting the *de novo* proceeding "to give due consideration to the expertise of the agency in its consideration of the facts as to whether or not there was a defect and whether such defect was safety related." H. REP. NO. 73-1452, 93d Cong., 2d Sess. 32 (1974).

[13] The full text of §155(c), 15 U.S.C. §1415(c), provides:

(c)(1) If a manufacturer fails to notify owners or purchasers in accordance with section 1413(c) of this title within the period specified under section 1413(b) of this title, the court may hold him liable for a civil penalty with respect to such failure to notify, unless the manufacturer prevails in an action described in subsection (a) of this section or unless the court in such an action restrains the enforcement of such order (in which case he shall not be liable with respect to any period for which the effectiveness of the order was stayed). The court shall restrain the enforcement of such an order only if it determines, (A) that the failure to furnish notification is reasonable, and (B) that the manufacturer has demonstrated that he is likely to prevail on the merits.

(2) If a manufacturer fails to notify owners or purchasers as required by an order under subsection (b) of this section, the court may hold him liable for a civil penalty without regard to whether or not he prevails in an action (to which subsection (a) of this section applies) with respect to the validity of the order issued under section 1412(b) of this title.

and Cougars is subject to failure which can result in loss of vehicle control, accident or injury."[14] Ford was given an opportunity to present arguments and data in rebuttal, and rebuttal was presented on April 22, 1975. On August 12, 1975, Ford received notification of the Administrator's final determination that seat back pivot pin bracket breakage constitutes a safety-related defect, accompanied by a §152(b) order to furnish notification and to remedy without charge. On August 18, 1975, Ford filed its complaint in district court, and applied for a temporary restraining order, preliminary injunction and convocation of a three-judge district court. The same day, the Government filed its enforcement action in the district court. Judge Hart granted the temporary restraining order. This three-judge court was duly convened. At argument, this court continued the restraint against enforcement of the penalty provisions, pending further order of the court.

II. JURISDICTION

The Government's brief contended that this court does not have jurisdiction to hear Ford's constitutional challenge because §155(c)(1) provides the exclusive means for obtaining a stay of the penalties provision—as a motion in the Government's enforcement action.[15] This jurisdictional contention was abandoned at oral argument,[16] and is without merit.

Under Ford's theory, the §155(c)(1) stay procedure comes too late because the penalties for noncompliance have already worked their chilling effect on the right to seek judicial review of the order, and is constitutionally inadequate also because it

[14] Verified Complaint for Declaratory and Injunctive Relief, Exhibit A.

[15] Government's Motion to Dismiss at 10-12.

[16] The Government conceded at the hearing that this court has jurisdiction, but asked that we decline to exercise jurisdiction where an enforcement action has been promptly filed. Tr. 47-49.

places the burden of establishing a right to equitable relief on Ford, rather than require the Government to convince the court of the need for coercing immediate compliance. The challenge here is to the constitutional adequacy of the §155(c)(1) stay in the context of civil penalties accruing immediately upon noncompliance. The jurisdictional objection would foreclose effective judicial consideration of Ford's constitutional objections. Ford is entitled to three-judge court review of the constitutionality of the statutory scheme as a whole.

Moreover, this Act does not embody a Congressional direction confining judicial jurisdiction to enforcement proceedings. Section 155(a)(1) of the statute, 15 U.S.C. §1415(a)(1), expressly provides for consolidation of "[a]ll actions (including enforcement actions) brought with respect to the same order under" §152(b). The stay procedure itself is not restricted in terms to enforcement actions.[17] Even if the §155(c)(1) stay procedure were restricted to enforcement actions, in the absence of language unmistakably withdrawing all equitable jurisdiction outside of the enforcement proceeding[18] this court would have inherent power to do equity in the face of an unconstitutional statute. But rather than legislate such withdrawal, Congress was willing to permit even pre-enforcement review of §142(b) orders, expressly leaving the question to the courts.[19]

[17] Unlike §155(b), the provisional notification provision, §155(c)(1) is not limited to "a civil action which relates to an order under [§152(b)] of this title, and to which [§155(a)(1)] applies. . . ." Although the legislative history indicates that pre-enforcement review actions would be subject to consolidation under §155(a)(1), *see* H. Rep. No. 93-142, 93d Cong., 2d Sess. 32 (1974), it is silent on whether an action for a stay which does not seek review of the §152(b) order itself can be obtained outside of the consolidated proceeding.

[18] *See, e.g.*, §204(d) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, at issue in Yakus v. United States, 321 U. S. 414 (1944).

[19] While the Senate Bill specifically provided for pre-enforcement review, S. Rep. No. 93-150, 93d Cong., 1st Sess. 6, 17 (1973), the House bill, whose provisions were ultimately enacted, took no position

These provisions fall short of the "clear and convincing" congressional intent required before a statute will be construed to restrict access to judicial review,[20] here of the penalty scheme as a whole.

III. THE PENALTY SCHEME

Ford's basic claim is that the penalty scheme is calculated to deter it from exercising its right to judicial review, by putting it to the Hobson's choice of either submitting to what it considers an erroneous agency determination based on informal procedures or challenging the order in the courts at the risk of a penalty of $800,000.[21] Ford argues that due process requires a tolling period during which it can secure a complete judicial review of the validity of the Government's order, and only upon a final judgment in the Government's favor should Ford's liability for noncompliance begin to run.

We do not take up Ford's further objection to the provisional notification provision, as exacerbating the chilling effect of the penalty scheme by exposing Ford to liability for noncompliance even if the underlying agency determination is ultimately deemed unlawful. The Administrator has not ordered provi-

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on the question, H. Rep. No. 93-1191, 93d Cong., 2d Sess. 28 (1974). In conference, the House position was adopted. . . "The conferees discussed but decided to take no position on whether or not pre-enforcement judicial review was available under the turn of the conference substitute. The conferees decided to leave that question to the courts." H. Rep. No. 93-1452, 93d Cong., 2d Sess. 32 (1974).

[20] *See* Johnson v. Robison, 415 U. S. 361, 373-74 (1974); Weinberger v. Salfi, 43 U.S.L.W. 4985, 4989 (U. S. June 26, 1975).

[21] Plaintiff at the hearing suggested that its total exposure was $1,600,000—$800,000 maximum penalty for noncompliance with the §152(b) order and another $800,000 for noncompliance with a §155(b) provisional notifications order. Tr. 3-4. The Government conceded the possibility of a double penalty on the premise that separate refusals, and hence "separate violations" within the terms of §109, are involved. Tr. 67. Since we decide that the provisional notification provision is not ripe for constitutional attack here, *see* text at note 22 *infra*, we do not reach the double penalty issue.

sional notification in this case. In the absence of agency implementation of this section of the Act, we have no basis for determining its reach, let alone for measuring it against the command of the Constitution. The Administrator may view his authority to order provision notification as limited to emergency situations—where the defect can be correlated with a significant incidence of highway accident and injury.[22] The mere possibility that the Administrator might exercise that power in this case is too speculative to warrant judicial consideration at this juncture.

As to Ford's principal claim, it is our view that the statute, fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction either in the Government's enforcement suit or, if the Government does not act promptly in bringing such a suit, in a pre-enforcement action. The court has jurisdiction to issue a temporary order restraining the operation of the penalties pending its determination of the motion for preliminary injunction and to issue a preliminary injunction that will stay the accrual of the penalties until the completion of the *de novo* enforcement proceeding in district court on the underlying order. However, if the court hearing the preliminary injunction motion deems the challenge insubstantial, it may deny such full relief and start up the clock that it has temporarily suspended. In that event, the manufacturer must give notification and remedy in accordance with the Administrator's directive or risk the payment of penalties should it lose on the merits in the Government's enforcement action.

Ford's contentions carry the infirmity of causing the Constitution to forbid Congress from placing barriers in the path of insubstantial litigation, embarked upon for delay and in the

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[22] Under a properly limited construction, §155(b) may strike a fair, constitutional balance between the manufacturer's right to judicial review and the driving public's right to be alerted to dangers attending continued operation of defect-marked automobiles.

hope that an agency may settle for less protection for the public than the law contemplates. In our view, and our reading of the cases, the basic constitutional requirement is satisfied if the manufacturer has an opportunity to convince a court that its ground for contesting the validity of the order are substantial, and the adequacy of that opportunity is established where it is made available before liability for noncompliance attaches.

The pertinent doctrine was registered by Justice Van Devanter—acknowledged for his learning in matters of jurisdiction—in *St. Louis, Iron Mountain & Southern Railway Company v. Williams,* 251 U.S. 63, 64-65 (1919):

> It is true that the imposition of severe penalties as mean of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate . . . before any liability for the penalties attaches. . . .
>
> And it is also true that where such an opportunity is afforded and the rate is adjudged valid, or the carrier fails to avail itself of the opportunity, it is then admissible, so far as due process of law is concerned, for the State to enforce adherence to the rate by imposing substantial penalties for deviations from it.

In that case the state law provided a penalty of "not less than fifty dollars, nor more than three hundred and costs of suit, including a reasonable attorney's fee" for each instance of a railroad's passenger rates exceeding statutory limits, *id.* at 64. Justice Van Devanter found that there was constitutionally adequate opportunity "for safely testing" the rate in a judicial proceeding because of the railroad's ability "to secure a determination of [the validity of the statutorily prescribed rates] by a suit in equity against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction."

Id. at 65. The crucial element—that the penalty "could have been suspended"—is far removed from Ford's contention that the penalty must automatically be suspended while it is litigating. Ford is afforded an adequate opportunity "for safely testing, in an appropriate judicial proceeding," the validity of the Administrator's directive, because it has the means to seek a suspension preventing penalties from accruing during litigation, assuming it can demonstrate grounds for injunctive relief—assuming it can show, what the Supreme Court has uniformly required in such cases, including *Oklahoma Operating Co. v. Love* on which Ford places emphasis, that the litigant had "reasonable ground to contest" the order.[23]

We have studied the line of cases cited by Ford—notably, *Ex parte Young, Wadley Southern Railway v. Georgia,* and *Oklahoma Operating Co. v. Love*—and are clear that they are consistent with the *Iron Mountain* teaching, that the Constitution is satisfied by the provision of an opportunity "for safely testing" administrative action.[24] They do not support the

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[23] In Oklahoma Operating Co. v. Love, 252 U.S. 331, 338 (1920), Justice Brandeis, reviewing a scheme imposing cumulative sanctions for noncompliance with an administrative order setting maximum rates for laundry work, held that the Constitution required a stay of the statutory penalties *pendente lite,* "provided that it also be found that the plaintiff had reasonable ground to contest [the rates] as being confiscatory." The Court in United States v. Morton Salt Co., 338 U.S. 632, 654 (1950), citing Brandeis' opinion, characterized the constitutional requirement as a "chance . . . for a test of reasonable objections. . . ."

United States v. Pacific Coast European Conference, 451 F.2d 712 (9th Cir. 1971), also cited by Ford, required a restraint of penalties during the course of judicial review, but the court there specifically found that "defendants mounted a substantial attack upon the validity of the statute and order," and that a stay would have been ineffective to stop the penalties from accruing. *Id.* at 719.

[24] In Ex parte Young, 209 U.S. 123 (1908), the only opportunity for contesting the validity of the statutory rates was by defense in a jury trial for felony. Similarly, in Oklahoma Operating Co. v. Love, *supra,* the only judicial review obtainable was in a contempt proceeding.

The Court in Wadley Southern Railway Co. v. Georgia, 235 U.S. 651, 669 (1915), noted that had plaintiff railroad utilized the

broader proposition asserted by Ford, that the Constitution dictates risk-free litigation. These decisions do take up a separate point, that the Constitution is offended when the penalty system is of such a nature as to create a virtual roadblock to judicial review. In *Ex parte Young*, where the statute provided criminal (felony) sanctions, the Supreme Court noted that the risk of imprisonment may deter all challenge, as the manufacturer will be unable to find a willing violator among his employees, and the jury in a criminal trial will not be able to adequately scrutinize the validity of the underlying regulatory statute or order.[25] In this context the Court held that to impose on a party the burden of obtaining a judicial decision "only upon the condition that, if unsuccessful,

available opportunity for judicial review of the agency order it could be held liable only for noncompliance occurring after an adjudication of the order's validity. There is no indication in Justice Lamar's opinion, however, of any right to an automatic cessation the penalties *pendente lite*.

More recent decisions of the Court indicate that what *Wadley* requires is an opportunity to obtain a stay upon a showing of the traditional grounds for equitable relief. Specifically addressing a *Wadley*-based attack on war-time price control legislation barring all interlocutory relief, the Court in Yakus v. United States, 321 U. S. 414 (1944), noted that "the statute itself provides an expeditious meaning of testing the validity of any price regulation, *without necessarily incurring* any of the penalties of the Act," *id.* at 438 (emphasis supplied), and that "[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," *id.* at 440. More recently, the Court in St. Regis Paper Co. v. United States, 368 U. S. 208, 226-27 (1961), rejected a *Wadley*-type argument, because since petitioners had the opportunity to obtain a "stay" upon commencement of the Government's enforcement action or prior to the accrual of penalties, "we could not therefore say it had 'no chance' to prevent the running of the forfeitures pending a test of the validity of the orders." The Fifth Circuit has construed *St. Regis Paper Co.* to condition the grant of a stay on a showing that "the challenged order 'appears suspect' and the review seeks a 'good faith test' of 'reasonable objections' to the order." Genuine Parts Co. v. FTC, 445 F.2d 1382, 1394 (5th Cir. 1971). *See also* cases cited in note 23 *supra*.

[25] Ex parte Young, 209 U. S. 123, 145-46, 164,-65 (1908).

he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts."[26] In the case at bar, in contrast, Congress contemplates and has provided for a judicial stay that will protect the contestant, assuming a threshold showing, even if unsuccessful on the merits, against accrual of penalties *pendente lite*. Furthermore, in *Ex parte Young*, and its line of cases, the appearance of a scheme providing cumulative penalties, mounting each day in severity, operated as a direct impost inflating with and because of the time required for the very exercise of the right to judicial review.[27]

In our view, the 1974 Amendments to the National Traffic and Safety Act, read in light of the legislative history and against the backdrop of general principles of federal equity practice, provide a constitutionally adequate tolling procedure, with the ultimate sanctions properly discretionary and noncumulative in nature.

[26] *Id.* at 148.

[27] *Id.* at 145 (penalty not to exceed $5,000 or 5 years' imprisonment, or both, for felony, with each ticket sale a separate violation); Wadley Southern Railway Co. v. Georgia, 235 U. S. 651, 653-54 (1916) (penalty not to exceed $5,000 per day for each day of continued violation); Oklahoma Operating Co. v. Love, 252 U. S. 331, 335, 337 (1920) (penalty not to exceed $500 per day for each day of noncompliance); St. Regis Paper Co. v. United States, 368 U. S. 208, 212 n.1, 225 (1961) (flat $100 a day penalty for each day of continued noncompliance after 30-day grace period); United States v. Pacific Coast European Conference, 451 F.2d 712, 714 (9th Cir. 1971) (penalty not to exceed $1,000 a day for each day of violation).

That this line of cases really goes to the cumulative nature of the penalty finds some support in the commentaries. *See* W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 477 n.24 (1970) ("If a money penalty for delay [in the commencement of Government enforcement proceedings] is so large and so inescapable that a respondent could not risk challenging an order he thought invalid, a denial of due process might result," *citing* Ex parte Young, *supra;* Oklahoma Operating Co. v. Love, *supra*); L. Jaffe, Judicial Control of Administrative Action 708 (1965) ("*Love* doctrine" does not extend to "every administrative order which becomes effective pendente lite [and] may eventually be enforced by penalties," but "is directed against huge cumulative penalties smacking of a purpose to block review.").

A. A Constitutionally Adequate Tolling Procedure

Section 155(c)(1) of the Act expressly provides for a judicial order of "restraint" in the Government's enforcement action—and this encompasses temporary restraining orders as well as preliminary injunctions. Congress intended authority in the court to provide plenary protection through a "restraint" in an appropriate case. We think it plain, as Government counsel acknowledged at oral argument, that the statute's provision for a "restraint" encompasses both the temporary restraining order and the preliminary injunction (Tr. 35), that "a very low threshold of showing need be made" for a temporary restraining order (Tr. 37-38), and that the temporary restraint could have a retroactive effect, staying the accrual of penalties from the date of the Administrator's directive (Tr. 38). That restraint remains binding whether the further ruling is one granting or denying a preliminary injunction.

In any case where the manufacturer presents a nonfrivolous question, a temporary restraining order is appropriate, for the nonfrivolous question shows that "the failure to furnish [immediate] notification is reasonable," and the equitable context of the statute establishes power to issue a temporary restraining order until the court has had opportunity to hear and consider the motion for preliminary injunction and opposition thereto.

Furthermore, it is our view that although a manufacturer can obtain this relief in a nonfrivolous case in the enforcement action, there is jurisdiction in a district court to entertain a petition to review an order of notification-and-remedy, though filed before enforcement, if filed in one of the district courts which Congress contemplated as having venue of matters arising under this statute—the District Court for the District of Columbia, and the district where the manufacturer is incorporated.[28] The concept of meaningful judicial restraint

[28] As discussed above, Congress left it to the courts to determine whether the statute permitted pre-enforcement review. *See* Notes 16, 19 and accompanying text *supra*. In line with the Third Circuit, *see*

would permit that court to enter a restraint pending the institution of an enforcement action and pending further consideration by the court in that enforcement action. If the enforcement action is brought promptly by the Government,[29] the action filed by the manufacturer should be consolidated with the enforcement action.[30]

General Motors Corp. v. Volpe, 321 F. Supp. 1112, 1121 (D.Del. 1970), *aff'd as modified*, 457 F.2d 922, 923-24 (3d Cir. 1972), we hold that there is jurisdiction in the specified district courts, under 28 U.S.C. §1337, 5 U.S.C. §701-06, and 28 U.S.C. §2201-02, to entertain a pre-enforcement action.

[29] If however, the Government fails to commence its enforcement action within a reasonable time after learning of the manufacturer's intention to challenge the notification-and-remedy order, the district court in the manufacturer's action could properly exercise its discretion to hear the manufacturer's motion for preliminary injunction. *See* General Motors v. Volpe, *supra*, 321 F. Supp. at 1130, *aff'd*, 457 F.2d at 924. The Government in this case concedes that full pre-enforcement review is available if its enforcement action is not promptly filed. Tr. 47. As the Supreme Court in United States v. Morton Salt Co., 338 U.S. 632, 654 (1950), responded to the charge that the Government may delay seeking enforcement in order to accumulate "ruinous penalties," "we are not prepared to say that the courts would be powerless if . . . the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them." *See* St. Regis Paper Co. v. United States, 368 U. S. 208, 226-27 (1961). *See also* W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 477 n.24 (1970).

Since the Government in this case brought its enforcement suit with requisite promptness—in fact, it filed its suit on the same day that Ford filed its complaint—we find that Ford will suffer no prejudice if its motion for a preliminary injunction is decided in the Government's action.

[30] Section 155(a)(1) contemplates consolidation in the district of the first enforcement action. 15 U.S.C. §1415(a) provides that consolidation be "in accordance with an order of the court in which the first such is brought. . . ." It did not address itself to the possibility of a pre-enforcement action by a manufacturer. While we entertain the possibility of a need for a pre-enforcement action, we think it contrary to the spirit of the Act to encourage forum-shopping by the manufacturer. We agree with the Third Circuit in General Motors v. Volpe, *supra*, 457 F.2d at 923-24. *See* note 29 *supra*, that the pre-enforcement action should be transferred to the district of the enforcement action, if that action has been promptly instituted.

Section 155(c)(1) permits the manufacturer to obtain a preliminary injunction if he can convince the court in the Government's enforcement action "that the failure to furnish notification is reasonable," and that "he is likely to prevail on the merits."[31] If the manufacturer makes this showing, he obtains a preliminary injunction which absolves him of liability for noncompliance *pendente lite*. Even if he has not previously obtained a temporary restraining order, the court has jurisdiction to issue an order of "restraint" that has a retroactive effect, tolling the penalties for the interim period between the point of noncompliance and its ruling, either way, on the application for preliminary injunction.[32] Insofar as Ford claims it wants a " 'grace period' in which to try for the preliminary [injunction] free from the threat of penalties,"[33] the statute permits that. The manufacturer will have had a meaningful day in court; the agency's order will not have obtained coercive effect in the face of a substantial challenge to its validity.

Ford argues that the §155(c)(1) stay procedure is constitutionally defective because it contemplates the grant of a preliminary injunction only where plaintiff shows he is "likely to prevail on the merits," and this, it is argued, works a shift in the burden of proof which raises the cost of challenging the

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[31] *Id.* §1415(c)(1). It should be noted this provision, rather than encumber review, makes it easier for a manufacturer to obtain a stay by eliminating the usual requirement of a showing of irreparable harm, which may be a difficulty in this type of case, where there is little or no effect on the manufacturer's current business. *See* General Motors Corp. v. Volpe, *supra,* 321 F. Supp. at 1129.

[32] Without pursuing the matter in over-elaborate detail, the court would have jurisdiction in an appropriate case to issue an order of restraint for this period even though it rules that no restraint will issue henceforth, and that the prayer for a continuing preliminary injunction is denied. The Government appears to have conceded this point (Tr. 38).

[33] Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction at 4.

order to a constitutionally prohibitive level.[34] In our opinion, Ford misconstrues the statutory language and thereby overstates its plight. Since the ultimate burden of proof remains with the Government, probable success on the merits for a manufacturer in Ford's position means only, as the Government here concedes (Tr. 41-42, 43-44), that he need show that the evidence is (probably) in equipoise. By "evidence in equipoise" we mean that on some item that it is material for the Government to establish, as the party with the burden of proof, the court cannot fairly say whether the item or its contrary is the more probable. It is entirely sound and straightforward analysis, though perhaps novel in formulation, to say that at the preliminary injunction stage a manufacturer establishes a requisite likelihood of ultimate success on the merits, if he shows at that time that the case is in equipoise as to a material item the Government must establish by a preponderence of evidence in the ultimate finding.

The statutory procedure does put on the manufacturer a burden of coming forward. It can discharge that burden by producing some evidence that its challenge is undergirded with substance. That burden is in substance no different from the showing generally required of litigants seeking to restrain the operation of a statute or regulation which, it is claimed, invalidly restricts their actions. Ordinarily, the statute or regulation is presumed valid, and regardless of the injury claimed to flow from the statute's operation, a preliminary injunction will not issue unless probable success on the merits is demonstrated.

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[34] Rather than have penalties attend a judicial determination of the order's validity after a *de novo* hearing at which the Government must justify its actions by a preponderance of the evidence, Ford argues that the statute arms the agency with coercive penalties which take effect immediately, and places the burden on the manufacturer to secure a tolling by proving its case on the motion for a preliminary injunction. Memorandum of Points and Authorities of Plaintiff in Support of Motions for Temporary Restraining Order and Preliminary Injunction at 14-15, 25.

There is no automatic right to interlocutory relief in the law. Even in the highly sensitive First Amendment area, where the courts are alert to remove "prior restraints" on protected expression, a "persuasive demonstration" of likely success on the merits is a necessary predicate to obtaining a preliminary injunction.[35] Moreover, where preservation of the status quo operates to the active detriment of the non-moving party, probable success on the merits takes on added importance as the critical prerequisite for relief.[36] Particularly where the public interest may be sacrificed by the grant of a preliminary injunction, courts of equity require a substantial showing by the moving party of the strength of its claim. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."[37] If the public interest is important enough, it may even justify an outright ban on all interlocutory relief, even though the effect is to confer immediate coercive power on

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[35] *See, e.g.*, A Quaker Action Group v. Hickel, 137 U. S. App. D.C. 176, 181-82, 412 F.2d 1111, 1116-17 (1969).

[36] *See, e.g.*, Delaware & Hudson Railway Co. v. United Transportation, 146 U. S. App. D.C. 142, 158-59, 450 F.2d 603, 619-20 (1971) (action by rail carriers to enjoin selective striking by union).

[37] Virginian Ry. v. System Federation No. 40, 300 U. S. 515, 552 (1937). *See* Yakus v. United States, *supra*, 321 U. S. at 440-42; Abbott Laboratories v. Gardner, 387 U. S. 136, 155-56 (1967); Associated Securities Corp. v. SEC, 283 F.2d 773, 775 (10th Cir. 1960); Floersheim v. Weinberger, 346 F. Supp. 950, 956 (D.D.C. 1972), *aff'd*, 161 U. S. App. D.C. 30, 494 F.2d 949 (1973). *See generally*, 11 Wright & Miller, Federal Practice & Procedure: Civil §2948, at 457-60 (1973).

Representative Staggers, the principal author of the 1974 amendments, specifically urged the courts, in determining whether or not to restrain enforcement of the Administrator's directive, to consider whether the public would not be adversely affected by the [manufacturer's] failure to notify." Cong. Rec. H. 10571 (daily ed. Oct. 15, 1974).

administrative orders.[38] This Act, of course, does not go nearly that far.

In light of the above, we cannot say that §155(c)(1) works an injury of constitutional dimension because it places the initial burden of coming forward on the manufacturer, to make some showing on, to establish at least substantiality for, the claim of invalidity of an order to give notification to consumers who may be driving unsafe vehicles.

This is the reality of the "restraint" procedure under the Act: (1) Once Ford comes forward with evidence establishing the substantiality of its objections, it obtains a preliminary injunction, subject to (2). (2) The injunction will be denied if the Government meets the burden of proving its case, of the existence of a safety-related defect, sufficiently to overcome the claim of mere equipoise, notwithstanding the proof tendered by the manufacturer. (3) If the preliminary injunction is denied, the manufacturer may continue to resist compliance, and to litigate, only by shouldering an exposure to an assessment of penalties if it loses on the merits.

B. Discretionary, Noncumulative Penalties

Ford would have a basis for attacking the statutory scheme if the penalties attached to noncompliance were inflexibly set at an amount "so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court." Life & Casualty Co. v. McCray, 291 U. S. 566, 574-75 (1934).

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[38] But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.

Yakus v. United States, *supra*, 321 U. S. at 440. The Court in *Yakus* held that preservation of the integrity of war-time price controls justified a statutory scheme which restricted manufacturers seeking to contest the validity of a price regulation to an exclusive review procedure, and which precluded any court from granting an interlocutory injunction staying enforcement of the regulation before final adjudication of its validity.

But this is plainly not such a case. It does not have the infirmity existing in most of the cases relied on by plaintiff, where the penalty involved criminal sanctions, including imprisonment,[39] or was cumulative—per day of violation—so that the time naturally required for substantial litigation served to penalize the act of litigating.[40] The cases upholding the substantially similar penalty provision of the National Traffic and Motor Vehicle Act, before its amendment in 1974,[41] have found this distinction conclusive. Nor is there even a minimum penalty. Section 109(a) of the Act[42] protects the manufacturer with two separate limitations prescribing maxima on civil penalties. One maximum is $1,000 per violation. The other is the overall maximum of $800,000 for any related series of violations. Even in gross, the $800,000 figure must be taken in conjunction with the fact that the class which will be affected —manufacturers or assemblers of motor vehicles or motor vehicle equipment—will not be denied access to the courts. It may well be within the range of the cost of litigation for such challenges.[43] More important, the $800,000 figure represents a maximum, not a minimum. There clearly is room for the court to set a substantially lower figure. The statute expressly authorizes the court to consider "the size of the business of the person to be charged and the gravity of the violation" in determining the amount of the penalty. Moreover, as the Government seems to concede (Tr. 42-43), the reasonableness and good faith of the manufacturer's noncompliance may

[39] *See* note 25 and accompanying text *supra*.

[40] *See* note 27 and accompanying text *supra*.

[41] General Motors Corp. v. Volpe, 321 F. Supp. 1112, 1126 n.25 (D.Del. 1970), *aff'd as modified*, 457 F.2d 922, 923 (3d Cir. 1972); United States v. General Motors Corp., 385 F. Supp. 598, 604 (D.D.C. 1974).

The only significant change, pertinent here, in the penalty scheme wrought by the 1974 amendments was to double the maximum penalty from $400,000 to $800,000.

[42] The text is found at note 10 *supra*.

[43] *See* United States v. General Motors Corp., 385 F. Supp. 598, 604 (D.D.C. 1074); Brown & Williamson Tobacco Corp. v. Engman, C.A. No. 75 Civ. 4047 (S.D.N.Y. August 28, 1975), slip op. at 6.

properly be considered in mitigation of the statutory maximum.[44] And it must be reiterated that even this exposure will attach only if the court has denied a preliminary injunction because it was convinced, as of that time, that the proof was not in equipoise, but rather more on the Government's side. The denial of a preliminary injunction, moreover, is not conclusive with regard to the penalties ultimately assessed, for in appraising good faith for purposes of assessing civil penalties the court can take it into account that in the case at hand the manufacturer had substantial strengths on the merits, and was not merely relying on judicial disinclination to treat even a weak dispute as sham. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconsideration between the public interest and private needs. . . ." *The Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944).

In this overall context, the statute does not give a right to judicial consideration that is only "nominal and illusory [because] the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 661 (1915). There is no risk unless the party is unable to convince the court to issue a preliminary restraint,

[44] Although the Government in United States v. General Motors Corp., 385 F. Supp. 598, 603 (D.D.C. 1974), sought $400,000, the statutory maximum at that time, Judge Gasch assessed only $100,000, because this was a case of first impression and therefore General Motors was "not acting in blatant disregard of a well-defined area of the law."

The courts have exercised similar discretion under the analogous penalty provision of the Federal Trade Commission Act, 15 U.S.C. §45(1). *See* United States v. ITT Continental Baking Co., 43 U.S.L.W. 4266, 4268 n. 8 (U. S. Feb. 19, 1975); United States v. J. B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974); Floersheim v. Engman, 161 U. S. App. D. C. 30, 33-35, 494 F.2d 949, 952-54 (1973); Brown & Williamson Tobacco Corp. v. Engman, *supra*, at 5; United States v. Beatrice Foods Co., 322 F. Supp. 139, 141 (D.Minn. 1971).

and in that case its exposure is "no more than the fair price of the adventure" of contesting the order; "the litigant must pay for his experience, like others who have tried and lost." *Life and Casualty Co. v. McCray,* 291 U. S. 566, 575 (1934).

IV. EXPEDITED REVIEW

The procedure for temporary relief outlined above envisions a foreshortening of the district court review process. Many, if not most challenges will be resolved, for all intents and purposes, by the disposition of the motion for preliminary injunction rather than after a more extensive trial. Litigants who fail to obtain temporary relief may well prefer to comply rather than press on in the hope of changing the court's appraisal, with the risk of both litigation costs and civil penalties.[45] But due process is not offended by expedition, as long as nonfrivolous claims can be reasonably aired.

Moreover, insofar as the statute does not give the manufacturer a "free ride"—to litigate without any risk of penalties—it advances the important public policy, embodied in the 1974 amendments, of a "timely remedy", and prompt adjudication of controversies relating to highway and motor vehicle safety.[46]

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[45] As this court stated in Delaware & Hudson Railway Co. v. United Transportation Union, *supra,* 146 U.S.App.D.C. at 159, 450 F. 2d at 620:

> The duty to appraise the merits at the stage of preliminary injunction is a duty of appellate as well as trial courts. Usually this appraisal is phrased in terms of probability or substantial likelihood of success after trial. Sometimes, however, the interest of justice is furthered by providing a determination on the merits, both at the trial court and on appeal, if and to the extent that the matter is ripe, notwithstanding that technically the only matter submitted is a request for a preliminary injunction. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 584-85, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

In *Youngstown Sheet & Tube Co.,* the Supreme Court decided issues of great constitutional moment—presidential implied power to order seizure of the nation's steel mills—even though the case proceeded no further than the preliminary injunction stage.

[46] Congress laid great stress on the importance of a "timely remedy," to give the driving public the quickest possible notice and

The public interest embraces measures to add a surcharge to deter frivolous litigation.[47] The 1974 amendments to the National Traffic and Motor Vehicle Safety Act sought to deter frivolous litigation by attaching a cost to challenges, without substantial merit, maintained for purposes of delaying the implementation of the statutory mandate.[48] We believe that Congress can constitutionally penalize such challenges, particularly where the public interest in safety demands prompt corrective action, as long as manufacturers can obtain an expedited hearing at which they can petition for immunity from penalties *pendente lite* upon a showing that their noncompliance rests on a challenge that is substantial.

Plaintiff's motion for a preliminary injunction, enjoining enforcement of the penalty scheme of the Act, as unconstitutional, is denied. It is in compliance with the Act, and not in its teeth, that in the exercise of its pendent jurisdiction this court issues a preliminary restraint, pending ruling by the District Court in the enforcement action on plaintiff's timely application in that action for a preliminary injunction.

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remedy of safety-related defects, consistent with due process. *See* H. Rep. No. 93-11, 93d Cong. 2d Sess. 16-17, 29 (1974); S. Rep. No. 1301, 89th Cong., 2d Sess. 1-2 (1973).

[47] On the problems of frivolous litigation in the labor area, *see* International Union of Electrical Workers v. NLRB [Tiidee Products], 138 U. S. App. D. C. 249, 426 F. 2d 1343 (1970); Note, NLRB Remedies—Attorney's Fees in Refusal-to-Bargain Cases, 1975 Duke L. J. 352.

[48] Citing instances of manufacturer recalcitrance to give notification and remedy without charge, H. Rep. No. 93-1191, *supra* note 45, at 16, the House Committee on Interstate and Foreign Commerce provided that noncompliance with the Administrator's notification-and-remedy order constituted a prohibited act, so that "when a manufacturer decides to contest the Secretary's determination of a defect or failure to comply, he does so at the risk of facing an enforcement proceeding brought by the Government and incurring a civil penalty for violations of section 108 of the 1966 Act, as amended by this bill," *id.* at 18.

The hearings in the House indicate that the penalty provisions was viewed as an alternative to criminal sanctions for securing compliance with the Act. Hearings before House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, on H. R. 7507, Pt. 1, 93d Cong., 1st Sess. 389 (1973).

Judge Parker concurs in all respects in the foregoing opinion.

HAROLD LEVENTHAL
Harold Leventhal
United States Circuit Judge

BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD MOTOR COMPANY

v.

WILLIAM T. COLEMAN
Secretary of Transportation

JAMES B. GREGORY
Administrator of NHTSA

EDWARD H. LEVI
Attorney General of the United States

UNITED STATES OF AMERICA

Civil Action
No. 75-1340

DISSENTING OPINION

I. INTRODUCTION

This case arises under the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended by the Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 1470, 15 U.S.C. §1381 *et seq.* A three judge court has been convened pursuant to 28 U.S.C. §§2282-2284 (1970) to examine Plaintiff Ford Motor Company's complaint which seeks to have this court declare invalid and restrain the enforcement, operation and execution of certain penalty provisions of the Act as amended in 1974 on the grounds that these provisions are repugnant to the due process clause of the Fifth Amendment of the Constitution of the United States. Ford does not seek to nullify the Act but rather seeks only to restrain the operation of the penalty provisions which Ford argues are designed to coerce motor vehicle manufacturers into foregoing their right to judicial review of notification orders of the National Highway Traffic Safety Administration (NHTSA),

orders which Ford contends are issued without adherence to the requirements of due process. Defendant William T. Coleman is Secretary of Transportation and is charged with responsibility for administration of the Act. Defendant James B. Gregory is the Administrator of NHTSA, to whom the Secretary of Transportation has delegated his responsibilities under the Act. Defendant Edward H. Levi is the Attorney General of the United States. Under the Act he is authorized to bring suit in the name of the United States against Ford Motor Company on the request of the Secretary of Transportation and the Administrator of NHTSA. The United States of America is named as a defendant since any suit brought against Ford under the Act would be brought in the name of the United States. Jurisdiction is invoked pursuant to 28 U.S.C. §1331 and 1337 (1970).

The defendants have opposed the declaratory and injunctive relief sought by Plaintiff Ford and have moved to dismiss the action. Defendants argue that the exclusive remedy for a stay of the civil penalties is that provided by section 1415(c)(1) of the Act as amended, 15 U.S.C. §1415(c)(1). Defendants further argue that pre-enforcement judicial review should not be permitted and that the plaintiff has failed to demonstrate a probability of success on the merits as to the charge of a safety-related defect and that the plaintiff has failed to satisfy any of the other prerequisites for injunctive relief. What defendants' contentions ignore, however, is the fact that Ford does not seek to stay the Act's civil penalties until the conclusion of the enforcement action brought against Ford by the United States in a separate case, (Civil Action No. 75-1345). Rather, Ford seeks to have those very civil penalty provisions declared unconstitutional. For reasons which will follow I would grant Ford's requested relief.

II. THE STATUTE AS AMENDED

The framework of the Act as amended creates a substantial obstacle to the manufacturer who challenges a determination of

the NHTSA Administrator. Section 152, 15 U.S.C. §1412, provides that if, after testing, inspection and research, the Secretary of Transportation determines that any motor vehicle contains a safety-related defect, he shall notify the manufacturer of this determination and include in the notification all of the information upon which the determination was based. Further the Secretary shall afford the manufacturer an opportunity to present data, views and arguments to establish that there is no defect or that the alleged defect does not affect motor vehicle safety. If, after the manufacturer's presentation, the Secretary determines that the vehicle contains a safety-related defect, then he shall order the manufacturer to furnish notification to owners, purchasers and dealers concerning the defect and to remedy the defect. This notification, as provided in section 153 of the Act as amended, 15 U.S.C. §1413, must contain a description of the defect; an evaluation of the risk it causes; a statement of the measures to be taken to remedy the defect; a statement that the manufacturer will remedy the defect without charge; the earliest date on which the defect will be remedied; and a description of the procedure to be followed by the recipient in informing the Secretary whenever a manufacturer, dealer or distributor fails or is unable to remedy the defect without charge. This notification must be furnished within a reasonable time, prescribed by the Secretary, after the manufacturer receives notice of the Secretary's determination of a safety-related defect and the notification must be sent by first class mail to each person who is registered under state law as the owner of a subject vehicle and whose name and address is reasonably ascertainable by the manufacturer through state records. Section 154 of the Act as amended, 15 U.S.C. §1414, further requires that, in any case where notification is required under section 152, the manufacturer of the vehicle containing a safety-related defect must remedy the defect without charge.[1]

[1] Section 154, however, does not apply during any period in which enforcement of the order has been restrained by a court in an enforcement action under section 155. Nor does section 154 apply where the court has set aside the order.

Section 108 of the Act as amended, 15 U.S.C. §1397, provides that no persons shall fail to furnish notification or remedy any defect or fail to comply with any order applicable to any manufacturer. Section 109, 15 U.S.C. §1398, provides that, for any violation of section 108's mandate, the violator will be subject to a civil penalty not to exceed $1000 for each violation with the maximum penalty for any related series of violations set at $800,000. Consequently, a manufacturer who receives notice that the Secretary of Transportation has determined that a safety-related defect exists in the manufacturer's vehicle and that the Secretary orders the manufacturer to notify owners and purchasers of the subject vehicle that a safety-related defect exists and that the manufacturer will remedy the defect without charge must comply with such order or face a fine of up to $800,000 depending on the amount of defective vehicles involved. Section 155(c)(1), 15 U.S.C. §1415(c)(1), provides that if the manufacturer fails to notify owners or purchasers, the court may hold him liable for the civil penalty unless the manufacturer prevails in an enforcement action brought under section 155(a), 15 U.S.C. §1415(a) or unless the court in the enforcement action restrains the enforcement of the notification order, in which case the manufacturer is not liable for any period during which the effectiveness of the order was stayed. However, the court may restrain enforcement of the notification order only if it determines that the manufacturer has demonstrated that the failure to furnish the notification was reasonable and that he is likely to prevail on the merits.

Furthermore, section 155(b) of the Act as amended, 15 U.S.C. §1415(b), exposes the manufacturer to an additional civil penalty of up to $800,000. Section 155(b) states that in an enforcement action relating to a notification order issued under section 152, 15 U.S.C. §1412, the Secretary may order the manufacturer to issue a provisional notification to owners and purchasers of the subject vehicles. This provisional notification must contain a statement that the Secretary has determined that

a safety-related defect exists and that the manufacturer is contesting this determination in court; a clear description of the Secretary's stated basis for his determination that a safety-related defect exists; the Secretary's evaluation of the risk to motor vehicle safety reasonably related to the defect; any measures necessary to avoid unreasonable hazard; and a statement that the manufacturer will remedy the defect without charge if the Secretary prevails in the court proceeding. Issuance of this provisional notification under section 155(b), 15 U.S.C. §1415(b) does not relieve the manufacturer of any liability for failing to issue the notification required by section 152, 15 U.S.C. §1412. Furthermore, under section 155(c)(2), 15 U.S.C. §1415(c)(2), if the manufacturer fails to send the provisional notification required by section 155(b), 15 U.S.C. §1415(b), he may be held liable for a civil penalty regardless of whether or not he prevails in the enforcement action in which the manufacturer challenges the validity of the Secretary's determination of a safety-related defect.

Essentially this statute provides for an informal administrative hearing lacking in procedural due process safeguards. Predicated on the administrative determination of a safety-related defect, arrived at from the informal proceeding, is the initial notification and remedy order and the provisional notification order and resultant civil penalties for violations of either order. The manufacturer may avoid the initial civil penalties by prevailing on the merits in an enforcement action. However, if his challenge to the validity of the agency determination fails, he is subject to those civil penalties. It is at this initial order stage that the statute first fails to meet Fifth Amendment due process requirements since the manufacturer must either comply with the initial notification and remedy order and thereby expend very substantial sums of money pursuant to an untested agency determination or challenge the determination on the merits in an enforcement action and risk the sanctions of substantial civil penalties if he ultimately loses in that suit. These initial civil penalties are not automatically stayed by a

manufacturer's challenge to the agency determination in an enforcement action in federal court. Indeed, the manufacturer is liable for the civil penalties unless he prevails in the enforcement action or unless the court preliminarily restrains the initial notification order and the court may provide such restraint only if the manufacturer demonstrates that his failure to furnish the notification was reasonable and that he is likely to prevail on the merits. Thus, preliminarily at least, the burden of proof in the enforcement action brought by the government to prove that a safety-related defect exists, shifts to the manufacturer for purposes of avoiding civil liability for violation of the very order challenged. Therefore, the manufacturer must demonstrate the merits of his arguments by a preponderance of evidence. The most accepted meaning given to this elusive concept is "proof which leads the jury to find that the existence of the contested fact is more probable than its non-existence." McCormick, *Evidence* 794 (2d ed. 1972). The majority's assertion, therefore, that the manufacturer could prevail preliminarily in the enforcement action and thus stay the civil penalties merely by demonstrating that their proof was in equipoise with the government's proof runs afoul of the plain and accepted meaning of burden of proof and the specific words of the statute. The law is and has always been that where the proof is in equipoise the party who has the burden of proof has not met that burden and cannot prevail. Nor do the words of the statute provide that the manufacturer must only mount such evidence as meets the government's submission. I would find this initial procedure of notification and resultant civil penalties unconstitutional because it operates to discourage and deter judicial review of administrative action by placing a high price on access to the courts.

Also predicated on the informal administrative hearing is the provisional notification requirement which, with its concomitant civil penalties, applies regardless of the ultimate disposition of the manufacturer's challenge. The sanctions of up to $800,000 for violation of the provisional notification order are identical to

those triggered by violation of the initial notification and remedy order. The manufacturer is at this point deprived of his property without due process for a second time. The manufacturer faces a civil penalty of up to $800,000 for failing to comply with this provisional notification order based on a proceeding which did not adequately permit him to answer and counter charges made by the agency; applied without judicial approval; and imposed whether or not the manufacturer ultimately prevails on the merits. Such a summary action born in an informal proceeding and untouched by the light of judicial review cannot survive tests required by the due process clause of the Fifth Amendment, and so I would hold it unconstitutional.

III. THE AGENCY PROCEEDING AND PROVISIONAL NOTIFICATION

Section 152(a)(2) of the Act as amended, 15 U.S.C. §1412(a)(2), provides that the "Secretary shall afford such manufacturer an opportunity to present data, views, and arguments to establish that there is no defect or failure to comply or that the alleged defect does not affect motor vehicle safety." Section 152(b), 15 U.S.C. §1412(b), provides that "If, after such presentations by the manufacturer . . ., the Secretary determines that such vehicle . . . does not comply with an applicable Federal motor vehicle safety standard, or contains a defect which relates to motor vehicle safety, the Secretary shall order the manufacturer (1) to furnish notification respecting such vehicle . . . to owners, purchasers and dealers . . . and (2) to remedy such defect or failure to comply . . . ." On April 22, 1975 the Plaintiff, Ford Motor Company, was afforded the opportunity to present its views in response to NHTSA's initial determination of March 13, 1975 that a safety-related defect existed in the front seat back pins of 1968 and 1969 model year Mustangs and Cougars, of which there are approximately 625,000 still in use in the United States. The NHTSA staff did

not present any sworn testimony. No complainants were called to testify. Ford was not granted the right or the opportunity to cross-examine any of the witnesses who testified against Ford. And under the agency's rules Ford did not have the power to subpoena adverse parties or persons who would testify in its behalf. In short, the agency proceeding was informal. On August 12, 1975 NHTSA notified Ford by letter that the agency had determined the existence of a safety-related defect and ordered Ford to send the notice of the NHTSA determination to the present owners of the automobiles in question and to replace the seat pins free of charge to the owners. Ford estimates the cost of compliance with this order at $19 million, and the cost of sending the provisional notification at $500,000.

The agency hearing itself troubles me greatly since it was an informal proceeding which did not accord the manufacturer the basic incidents of procedural due process and yet subsequently exposed the manufacturer to substantial civil penalties as a result of the agency determination derived from the proceeding. Several fundamental aspects of procedural due process were lacking in the agency hearing, such as "the right to confront and cross-examine witnesses." *Jenkins v. McKeithen,* 395 U. S. 411, 428 (1969); *Willner v. Committee on Character and Fitness,* 373 U. S. 96, 103-04 (1963), (procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood) *Greene v. McElroy,* 360 U. S. 474, 496-97 (1959). (The requirements of cross-examination and confrontation apply in cases where administrative and regulatory actions are under scrutiny.) So also is the right to present evidence "essential to the fair hearing required by the Due Process clause." And this must perforce include the "right to present oral testimony from other witnesses and the power to compel attendance of those witnesses." *Jenkins v. McKeithen,* supra, at 429. As the *Jenkins* court stated, "We do not mean to say that the Commission may not impose reasonable restrictions on the number of witnesses and on the substance of their testimony; we only hold that a person's right

to present his case should not be left to the unfettered discretion of the Commission." *Id.* This is particularly true in the case at bar since the consequence of the agency's determination is exposure to substantial civil penalties for non-compliance with the order or to a substantial expenditure of the manufacturer's own funds if it complies with the order. The remarks of the Supreme Court in *Morgan v. United States,* 304 U.S. 1, 14-15 (1938), are particularly appropriate in this context:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.[2]

The legislative history of the amendments indicates that the absence of due process elements at the agency level was no accident. Indeed, the Conference Report on the bill which became the 1974 amendments rejected the Senate's proposal which would have required the Secretary of Transportation to provide the manufacturer with "a statement of his reasons and basis for the findings of a safety-related defect" and would have granted the manufacturer a limited right of a cross-examination. H.R. Rep. No. 93-1452, 93d Cong., 2d Sess. at 24 (1974).

The troubling aspect of this administrative procedure is that, on the Administrator's determination, derived from an informal

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[2] *See also Baltimore & Ohio R.R. v. United States,* 298 U. S. 349, 368-69 (1936).

hearing, the manufacturer is exposed first to civil penalties of up to $800,000 for failure to comply with the initial notification order and, second, to civil penalties of up to $800,000 for failure to comply with an order to send the provisional notification. Now it is true that the manufacturer may prevail at the preliminary injunction stage and avoid the initial civil penalties for the period during which the notification order was stayed. And, of course, if the manufacturer ultimately prevails in the enforcement action, he will avoid these civil penalties.[3] However, even if the manufacturer ultimately prevails on the merits in the enforcement action, he may still be liable for civil penalties of up to $800,000 for failure to comply with the provisional notification portion of the statute. This provision cannot stand for it imposes civil penalties solely on the basis of an informal administrative proceeding lacking in due process protections, totally untested in a judicial forum. Essentially the manufacturer is exposed to a deprivation of property based on an administrative determination where due process rights were not granted and without an opportunity for judicial review of the validity of the determination prior to the deprivation of property. As if to add insult to injury, the provisional notification section of the statute applies civil penalties for failure to comply regardless of the outcome of the enforcement action, despite the fact that the manufacturer might well prevail. I do not think that it is premature to pass on the validity of the provisional notification provision. The government has already filed the enforcement action in this court and there is no indication by the government that it will not seek to invoke the provisional notification requirement of the statute.

The provisional notification section of the statute contravenes the Fifth Amendment because it works a deprivation of property without due process of law insofar as its application is based on the informal administrative proceeding discussed earlier and

[3] I do not endorse this procedure since I believe it erects unconstitutional barriers to access to the federal courts and I will speak to it in part IV. of this opinion.

insofar as it denies the manufacturer the right to a judicial examination of the merits of the agency determination before the civil penalties are imposed and thus before the manufacturer is deprived of his property. The Supreme Court stated this concept succinctly in *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972):

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.

Fuentes dealt with the prejudgment replevin provisions in two state statutes and the issue was whether procedural due process required an opportunity for a hearing before the state authorized its agents to seize property in the possession of one person upon the application of another. The court invalidated both statutes and stated that the "constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions." *Id.* at 80. The court went on to state that:

> This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although this Court has held that due process tolerates variance in the form of a hearing 'appropriate to the nature of the case', (citation omitted), and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]', (citation omitted), the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. (citations omitted). *Id.* at 82.[4]

Thus the "root requirement" of due process is that an "individual be given an opportunity for a hearing before he is deprived

[4] *See Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 153 (1941) (The requisite hearing must be held at some point before the Administrative Order becomes final.)

of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id.* It is unlikely that the present set of facts poses such an extraordinary demand for compliance since the Department of Transportation has been aware of problems with the seat back pins since 1969. There are, of course, differences in the facts of the case at bar and *Fuentes.* But the impact of that decision is unmistakeable. The Court has rejected prejudgment deprivations of property and that is precisely what Ford Motor Company as a manufacturer faces in this suit. No court has yet adjudged the validity of NHTSA's determination that a safety-related defect exists in 1968 and 1969 Mustangs and Cougars. Notwithstanding this absence of judicial gloss, the manufacturer is liable for substantial civil penalties for challenging and failing to comply with this untested conclusion. Such an effect does not comport with the due process concepts expressed in *Fuentes.* Nor is it in line with the due process described in *Goldberg v. Kelly,* 397 U. S. 254 (1970). The issue in *Goldberg* was whether a state which terminated public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination of his benefits denied the recipient procedural due process in violation of the Fourteenth Amendment. The court held that "due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result." *Id.* at 261. With respect to the civil penalties resulting from failure to comply with the provisional notification requirements of the statute, there is not even a "later constitutionally fair proceeding" to pass on the merits of failure to comply with provisional notification demands. The Act as amended summarily declares the provisional notification requirements and imposes sanctions for violations, all without granting the manufacturer a due process context within which to present his case and without regard for whether or not the manufacturer ultimately prevails

on the merits and without judicial examination of the agency determination. The words of the Supreme Court in *Greene v. McElroy,* 360 U. S. 474, 496-97 (1959) bear strongly on this point:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, (citations omitted), but also in all types of cases where administrative and regulatory actions were under scrutiny. (citations omitted).

Application of this statute's provisional notification provision with the resultant civil penalty deprives the manufacturer of his due process right to challenge the validity of the agency determination before he suffers sanctions from it.

The case of *Sniadach v. Family Finance Corp.,* 395 U. S. 337 (1969) also speaks to the concern for summary procedures which result in deprivation of property. In *Sniadach* the Court struck down a state procedure for prejudgment garnishment of wages. Wages were frozen on a creditor's request and remained frozen until trial was had and the wage earner prevailed on the merits. In the interim the wage earner was deprived of his enjoyment of earned wages without any opportunity to be heard and to tender a defense. In the case at bar, the provisional notification section of the statute provides

for a similarly summary procedure with no chance to avoid civil penalties even if the manufacturer ultimately prevails on the merits in the enforcement. This places the manufacturer in a more untoward position than the garnishee in *Sniadach*.[5] Application of the due process guarantees expressed in *Fuentes* and *Sniadach* has not been limited to individuals. Most recently the Supreme Court extended its ban on prejudgment garnishment to corporate funds in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975). In this case the bank account of a corporation was impounded and, absent a bond, put totally beyond use during the pendency of litigation involving an alleged indebtedness for goods sold and delivered. This was accomplished by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer. The only method of dissolving the garnishment was for the defendant to file a bond to protect the plaintiff creditor and in this way the defendant debtor could challenge the garnishment. The Supreme Court struck down this state statutory procedure stating:

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause. 419 U. S. at 608.

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[5] Summary procedures may be appropriate and may meet due process requirements in extraordinary situations. *See Sniadach v. Family Finance Corp.*, 395 U. S. 337, 339 (1969). But in an investigation such as this which has dragged on for six years before an order was issued, the adjective "extraordinary" is hardly warranted. For investigations which are not so ongoing as this one, there are methods of accomplishing the same objective of protecting the driving public and staying within the bounds of procedural due process. *See* Hearings Before the Senate Commerce Committee on S. 355, 93d Cong., 1st Sess., (1973) at 6.

The provisional notification portion of the Act as amended cannot stand insofar as it summarily assigns civil penalties for failure to comply based on an administrative determination arrived at without procedural due process safeguards for the manufacturer; prior to judicial testing of the validity of the agency determination; and without regard for the ultimate disposition of the case. Therefore I would find the provision unconstitutional as contravening the due process clause of the Fifth Amendment.

IV. THE PENALTY PROVISIONS FOR VIOLATION OF THE ORDER TO NOTIFY AND REMEDY

Under section 152(b) of the Act as amended, 15 U.S.C. §1412(b), the NHTSA Administrator may, after hearing the manufacturer's presentation at the informal proceeding and determining the existence of a safety-related defect, order the manufacturer to notify owners, purchasers and dealers of the determination and to remedy the defect without charge. If the manufacturer fails to so notify owners or purchasers, he is liable for civil penalties of up to $800,000 under section 155(c)(1) of the Act as amended, 15 U.S.C. §1415(c)(1). The only statutory method prescribed for avoiding such civil penalties lies in a challenge to the agency determination of a safety-related defect in an enforcement proceeding brought by the government after the manufacturer refuses to comply with the notification and remedy order issued pursuant to section 152(b), 15 U.S.C. §1412(b). Constitutional difficulties arise because the civil penalties are not stayed during the pendency of the enforcement litigation and are in fact only imposed if the manufacturer loses the suit. Preliminarily the court may restrain the enforcement of the notification and remedy order in which case the manufacturer is not liable for any period during which the order was stayed. But the court may only preliminarily restrain the order if the manufacturer demonstrates that his failure to furnish the notification was reasonable and that he

is likely to prevail on the merits. This statutory framework locks the manufacturer in a difficult dilemma if he feels the agency determination was not correct. He may capitulate and obey the order, thus incurring very substantial expenditures to notify and remedy a defect which he may in good faith believe is not safety-related.[6] Or he may choose not to comply with the order in which case he faces an enforcement suit which is essentially a trial *de novo* with the burden of proof on the government. *United States v. General Motors Corp.*, No. 74-1656 (D.C. Cir., Aug. 4, 1975) Slip Op. at 1367. Under section 155(a)(1) of the Act as amended, 15 U.S.C. §1415(a)(1) any action brought by the manufacturer challenging the order would be consolidated with the enforcement action. Concurrent with the trial *de novo* of course are the civil penalties provisions mentioned earlier and the manufacturer risks imposition of these penalties if he challenges the agency determination in a judicial forum and is unsuccessful. This must of necessity create an apprehension in the mind of the manufacturer that indeed chills his access to the courts for he knows that the penalty for losing the suit may be $800,000.[7] Such a bar to federal courts will not be tolerated by the Due Process Clause of the Fifth Amendment, and such inhibiting provisions have been struck down by the Supreme Court many times.

The guiding principle in this area of access to federal courts is expressed in *Life & Cas. Ins. Co. v. McCray*, 291 U. S. 566 (1934). There the court upheld a state statute imposing a surcharge on insurance companies which failed to pay claims

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[6] A safety-related defect is one which creates an unreasonable risk of accidents or an unreasonable risk of death or injury to persons in the event accidents occur. 15 U.S.C. §1391. *See United States v. General Motors*, No. 74-1656 (D.C. Cir., Aug. 4, 1975) Slip Op. at 1378.

[7] This is exactly what the Congress intended. The House Report on the 1974 amendments states that "when a manufacturer decides to contest the Secretary's determination of a defect or failure to comply, he does so at the risk of facing an enforcement proceeding brought by the government and incurring a civil penalty." H.R. Rep. No. 93-1191, 93d Cong., 2d Sess. at 18 (1974).

when demand was made within the time specified in the policies. The court noted that the insurer was not penalized for taking a controversy on the validity of the claim into court but was rather penalized for refusing to make payment in accordance with its contract and, further, the penalty was in an amount reasonably proportional to the loss or inconvenience likely to be suffered by the beneficiary of the policy. However, Mr. Justice Cardozo indicated that:

> The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open. 291 U. S. at 574-75.

The leading case on this point is *Ex parte Young*, 209 U. S. 123 (1908). Two Minnesota statutes were passed in 1907 which directed railroads in that state to establish certain rates for transportation of passengers and commodities. Violations of the passenger rate statute was a felony punishable by a fine of $5000 and 5 years imprisonment while violation of the commodities rates was a misdemeanor. Stockholders of a number of the railroad companies filed suit in federal court against their companies seeking to enjoin the railroad companies from publishing or adopting the rates set forth in the two Acts and to enjoin other defendants including state Attorney General Young from attempting to enforce the statutes by instituting any action against the railroad companies or their officers. The suits also alleged that the new rates were unjust, unreasonable and confiscatory and deprived them of their property without due process of law. The lower court restrained Attorney General Young from enforcing the penalties and he violated the injunction by enforcing penalties against one of the railroad companies. Consequently, Young was adjudged in contempt of court by the lower court. The officers and directors of the railroad companies had declined to file suit to have the statutes declared illegal because of the severity of the penalties pre-

scribed for violations and the "ruinous consequences which would inevitably result from failure on their part to obey the said laws and orders, a result which no action by themselves, their stockholders or directors could possibly prevent." *Id.* at 130. The penalties were alleged to be "so drastic that no owner or operator of railway property could invoke the jurisdiction of any court to test the validity thereof, except at the risk of confiscation of its property, and the imprisonment for long terms . . . of its officers, agents and employees." *Id.* at 131. Thus the company was liable to be deprived of its property because it could only seek a judicial hearing on the unconstitutionality of the statutes at the risk, if mistaken, of being subjected to substantial penalties resulting in confiscation of its property while obedience to the statutes might also result in the long run in the same confiscation by a slower process. *Id.* at 144-45. The Supreme Court held that the statutes were invalid on their face because of the penalties. *Id.*

> The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts . . . for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. *Id.* at 145-46.
>
> It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. *Id.* at 147.

The court rejected the suggestion that the proper method of testing the acts' validity was disobedience:

> To await proceedings in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risks of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take. Over eleven thousand millions of dollars, it is estimated, are invested in railroad property owned by many thousands of people . . . and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property, no more, no less. The courts having jurisdiction, Federal or state, should at all times be open to them as well as to others, for the purpose of protecting their property and their legal rights. 209 U. S. at 165.

The message of *Ex parte Young* is clear. Penalties cannot be employed by legislatures to inhibit judicial review of the validity of statutes or administrative determinations. This principle was followed in *Oklahoma Operating Co. v. Love*, 252 U. S. 331 (1920). There a corporation sued the state corporation commission seeking to enjoin the commission from enforcing its order limiting certain rates. Under a state statute there was no opportunity for judicial review of a legislative rate fixed by the commission except by way of defense to contempt proceedings. The penalty for disobeying a commission order was a fine of up to $500 per day. Relying on *Ex parte Young*, the court held the penalty scheme unconstitutional:

> [T]he only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt . . . By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to

> satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be $500; and each day's continuance of the refusal after service of the order it is declared 'shall be a separate offense.' The penalty may apparently be imposed for each instance of violation of the order . . . Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the sufficiency of those rates. 252 U. S. at 336-37.

These cases point out the controlling rule of law for review of administrative orders in Federal courts:

> [T]he right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. *Wadley Southern Ry v. Georgia,* 235 U. S. 651, 661 (1915).

In *Wadley,* the railroad, disputing an order of the Railroad Commission, chose not to comply with the order, thus placing it in violation of a statute which required compliance with every order of the Commission by persons subject to the public utility law. Violators were subject to a fine of $5000. Discussing cases involving penalties for violations of the legislative orders of commissions, including *Ex parte Young,*[8] the court said:

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[8] *See Willcox v. Consolidated Gas Co.,* 212 U. S. 19, 53-4 (1909) and *Missouri Pac. Ry v. Tucker,* 230 U. S. 340, 350-51 (1913) for similar results.

> These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based on the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders but depends on a showing of extrinsic facts. A statute therefore which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid. 235 U. S. at 662-63.

In *United States v. St. Regis Paper Co.,* 285 F.2d 607, 615 (2d Cir. 1960), *aff'd,* 368 U. S. 208 (1961), the court upheld a daily penalty provision in the Federal Trade Commission Act which was triggered by a corporation's failure to submit a requested special annual report. The penalty provision was saved, however, only by the availability of the Declaratory Judgment Act and the Administrative Procedure Act which the court held would be available to the corporation in the pre-enforcement period. In the case at bar it does not appear that

pre-enforcement review is available.[9] Thus the Second Circuit's remarks are apposite:

> If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. *Cf. Oklahoma Operating Co. v. Love,* 1920, 252 U. S. 331. 285 F.2d at 615.

Finally, in *United States v. Pacific Coast European Conference,* 451 F.2d 712 (9th Cir. 1971), a suit brought by the government to assess statutory penalties against three shipping conferences for using unlawful dual-rate shipping contracts, the court of appeals citing *Oklahoma Operating Co. v. Love, Missouri Pacific Ry Co. v. Nebraska* and *Ex parte Young, supra,* and specifically relying on *Wadley Southern Ry Co. v. Georgia, supra,* refused to apply the statutory penalty for non-compliance with the Shipping Act of 1961 during the time the defendants were judicially testing the validity of that Act. The statutorily mandated fate of the defendant conferences in *Pacific Coast* during the pendency of their litigation was in a very real sense less burdensome than that faced by the manufacturer in the case at bar. The conferences could either accept the Commission's dual-rate order or forego any dual-rate contracts while they pursued their judicial remedy. The appellate court quickly dismissed this "riskless remedy" by noting that apart from the fact that acceptance of the Commission's order might moot the case, neither remedy "comports with defendant's constitutional right of contract except where impaired by valid statute or administrative order." 451 F.2d at 718. I would submit that the Fifth Amendment due process rights at issue here are every bit as important as this constitutional right of contract and demand the same consideration by this court. Penalties may not be assessed under a statute

[9] *See General Motors Corp. v. Volpe,* 321 F. Supp. 1112, 1131 (D. Del. 1970), *aff'd,* 457 F.2d 922 (3d Cir. 1972).

whose very validity is challenged by the party against whom sanctions are sought. The pattern in all of these cases appears from the same loom whose fabric we examine in this case. That pattern consists of a statutory framework designed to deter judicial review of legislative or administrative determinations. It is of little consequence that the sanctions in this case are civil rather than criminal penalties. Nor is it of significant moment that the penalties imposed in this statute are not cumulative on a daily basis. The penalties in this Act as amended are substantial; they deprive the manufacturers of property; and their purpose is to inhibit judicial review. This is the common thread which runs through all of these cases and which binds our present case to those precedents. The "fair price of adventure" is too high,[10] and the argument that automobile manufacturers may be able to afford such penalties does not overcome the inevitably chilling effect which the penalty provisions instill. The legacy of *Ex parte Young* is directed against the erection of inhibiting barriers to judicial review of legislative or administrative action in proper federal cases. I do not mean to suggest that safety-related defects in motor vehicles should not be expeditiously rectified; nor do I intimate that the burden of remedy should not fall on the manufacturer. However, expedition must be accomplished through constitutional methods which comport with procedural due process concepts of dealing with property. The penalty scheme accompanying the notification and remedy order in the Act as amended does not meet such Fifth Amendment requirements and I therefore find it unconstitutional.

V. CONCLUSION

Finding the penalty schemes accompanying the provisional notification order and notification and remedy order provisions of the Act as amended repugnant to the due process clause of

[10] *See Life & Cas. Ins. Co. v. McCray,* 291 U. S. 566, 575 (1934).

the Fifth Amendment, I would declare such provisions in section 155(c)(1) and section 155(c)(2) as read in concert with sections 108, 109 and 152 unconstitutional and I would restrain their operation and enforcement.

GEORGE L. HART, JR.
George L. Hart, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD MOTOR COMPANY *Plaintiff,* v. WILLIAM T. COLEMAN, *et al.* *Defendants.*	Civil Action No. 75-1340

Before: Leventhal, Circuit Judge, In Chambers:

ORDER

IT IS ORDERED by the Court that the majority opinion of September 22, 1975, in the above-entitled case is hereby amended as follows:

1. At p.7, ¶3, line 6 is replaced by the following:
Pre-enforcement action. The court has jurisdiction to issue a temporary order restraining the operation of the penalties pending its determination of the motion for preliminary injunction and to issue a prelimin-

2. At p.11 n.27, the first line of the second paragraph is replaced by the following:
That this line of cases really goes to the cumulative nature of the penalty

3. At p.11 n.27, the fourth line of the second paragraph is replaced by the following:
alty for delay [in the commencement of Government enforcement proceedings] is so large and so inescapable that a respondent could not risk

4. At p.13, the second and third lines of the second paragraph are replaced by the following:
defective because it contemplates the grant of a preliminary injunction only where plaintiff shows he is "likely to prevail on the merits,"

5. At p. 17, the twelfth line is replaced by the following; seems to concede (Tr. 42-43), the reasonableness and good faith of the manufac-

6. At p. 20, the first line is replaced by the following: immunity from penalties *pendente lite* upon a showing that their non-compli-

HAROLD LEVENTHAL
Harold Leventhal
United States Circuit Judge

Entered: December 1, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORD MOTOR COMPANY, *Plaintiff,* v. WILLIAM T. COLEMAN, *et al.,* *Defendants.*	Civil Action No. 75-1340

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§1253 and 2282, Ford Motor Company ("Ford"), the plaintiff, hereby appeals to the Supreme Court of the United States from an order of the United States District Court for the District of Columbia (Leventhal, Cir. J., and Parker, D. J.; Hart, D. J., dissenting) entered on or about September 22, 1975, denying Ford's motion for a preliminary injunction to restrain, on the ground of repugnancy to the due process clause of the Fifth Amendment of the United States Constitution the operation, enforcement, and execution of Sections 108, 109, 152, and 155(c) of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended by the Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 147, U.S.C. §§ 1397, 1398, 1412, and 1415(c).

Respectfully submitted,

ARNOLD & PORTER

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Dated: October 21, 1975
Washington, D. C.

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court and of the Bar of the Supreme Court of the United States, hereby certifies, pursuant to Rules 10(2) and 33 of the Supreme Court, that on October 21, 1975, he served the within notice of appeal upon the defendants herein by causing true copies to be deposited in postage prepaid envelopes addressed to the persons identified in the accompanying service list.

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Leonard H. Becker

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U. S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Traffic Act, Section 108 (15 U.S.C. § 1397):

Prohibition against manufacture, sale, delivery, or importation of substandard vehicles and against rendering inoperative certain devices, elements of design or motor vehicle equipment—Access to record; certificate; notification of defect; "motor vehicle repair business" defined; exemptions from inoperation restriction; exemption of safety belt interlocks and continuous buzzers

(a)(1) No person shall—

(A) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this subchapter unless it is in conformity with such standard except as provided in subsection (b) of this section;

(B) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 1401 of this title; fail to keep specified records in accordance with such section; or fail or refuse to permit impounding, as required under section 1401(a) of this title;

(C) fail to issue a certificate required by section 1403 of this title, or issue a certificate to the effect that a motor vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards, if such person in the exercise of due care has reason to know that such certificate is false or misleading in a material respect;

(D) fail—

(i) to furnish notification,

(ii) to remedy any defect or failure to comply, or

(iii) to maintain records,

as required by part B of this subchapter; or fail to comply with any order or other requirement applicable to any manufacturer, distributor, or dealer pursuant to such part B;

(E) fail to comply with any rule, regulation, or order issued under section 1401 or 1404 of this title;

(F) to fail to comply with regulations of the Secretary under section 1392(i)(2) of this title.

(2)(A) No manufacturer, distributor, dealer, or motor vehicle repair business shall knowingly render inoperative, in whole or part, any device or element of design installed on or in a motor vehicle or item of motor vehicle equipment in compliance with an applicable Federal motor vehicle safety standard, unless such manufacturer, distributor, dealer, or repair business reasonably believes that such vehicle or item of equipment will not be used (other than for testing or similar purposes in the course of maintenance or repair) during the time such device or element of design is rendered inoperative. For purposes of this paragraph, the term "motor vehicle repair business" means any person who holds himself out to the public as in the business of repairing motor vehicles or motor vehicle equipment for compensation.

(B) The Secretary may by regulation exempt any person from this paragraph if he determines that such exemption is consistent with motor vehicle safety and the purposes of this chapter. The Secretary may prescribe regulations defining the term "render inoperative".

(C) This paragraph shall not apply with respect to the rendering inoperative of (i) any safety belt interlock (as defined in section 1410b(f)(1) of this title) or (ii) any continuous buzzer (as defined in section 1410b(f)(4) of this title) designed to indicate that safety belts are not in use.

(D) Paragraph (1)(A) of this subsection shall not apply to the sale or offering for sale of any motor vehicle which has such

a buzzer or interlock rendered inoperative by a dealer at the request of the first purchaser of such vehicle.

Sale or delivery of used vehicles; federal standards for used vehicles; good faith failure to conform to federal safety standards; importation of substandard vehicles

(b)(1) Paragraph (1)(A) of subsection (a) of this section shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale. In order to assure a continuing and effective national traffic safety program, it is the policy of Congress to encourage and strengthen the enforcement of State inspection of used motor vehicles. Therefore to that end the Secretary shall conduct a thorough study and investigation to determine the adequacy of motor vehicle safety standards and motor vehicle inspection requirements and procedures applicable to used motor vehicles in each State, and the effect of programs authorized by this subchapter upon such standards, requirements, and procedures for used motor vehicles, and report to Congress as soon as practicable but not later than September 9, 1967, the results of such study, and recommendations for such additional legislation as he deems necessary to carry out the purposes of this chapter. As soon as practicable after the submission of such report but no later than one year from the date of submission of such report, the Secretary, after consultation with the Council and such interested public and private agencies and groups as he deems advisable, shall establish uniform Federal motor vehicle safety standards applicable to all used motor vehicles. Such standards shall be expressed in terms of motor vehicle safety performance. The Secretary is authorized to amend or revoke such standards pursuant to this chapter.

(2) Paragraph (1)(A) of subsection (a) of this section shall not apply to any person who establishes that he did not have reason to know in the exercise of due care that such vehicle or

item of motor vehicle equipment is not in conformity with applicable Federal motor vehicle safety standards, or to any person who, prior to such first purchase, holds a certificate issued by the manufacturer or importer of such motor vehicle or motor vehicle equipment, to the effect that such vehicle or equipment conforms to all applicable Federal motor vehicle safety standards, unless such person knows that such vehicle or equipment does not so conform.

(3) A motor vehicle or item of motor vehicle equipment offered for importation in violation of paragraph (1)(A) of subsection (a) of this section shall be refused admission into the United States under joint regulations issued by the Secretary of the Treasury and the Secretary; except that the Secretary of the Treasury and the Secretary may, by such regulations, provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable Federal motor vehicle safety standard prescribed under this subchapter, or will be exported or abandoned to the United States.

(4) The Secretary of the Treasury and the Secretary may, by joint regulations, permit the temporary importation of any motor vehicle or item of motor vehicle equipment after the first purchase of it in good faith for purposes other than resale.

(5) Paragraph (1)(A) of subsection (a) of this section shall not apply in the case of a motor vehicle or item of motor vehicle equipment intended solely for export, and so labeled or tagged on the vehicle or item itself and on the outside of the container, if any, which is exported.

Continuation of common law liability

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Traffic Act, Section 109 (15 U.S.C. § 1398):

Civil penalties: Secretary's authority to compromise

(a) Whoever violates any provision of section 1397 of this title, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 1397 of this title, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $800,000 for any related series of violations.

(b) Any such civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

Traffic Act, Section 152 (15 U.S.C. § 1412):

Notification respecting Secretary's finding of defect or failure to comply; publication in Federal Register; data, views, and arguments: presentation opportunity

(a) If through testing, inspection, investigation, or research carried out pursuant to this chapter, or examination of communications under section 1418(a)(1) of this title, or otherwise, the Secretary determines that any motor vehicle or item of replacement equipment—

(1) does not comply with an applicable Federal motor vehicle safety standard prescribed pursuant to section 1392 of this title; or

(2) contains a defect which relates to motor vehicle safety; he shall immediately notify the manufacturer of such motor vehicle or item of replacement equipment of such determination, and shall publish notice of such determination in the Federal Register. The notification to the manufacturer shall include all information upon which the determination of the Secretary is based. Such notification (including such information) shall be available to any interested person, subject to section 1418(a)(2)(B) of this title. The Secretary shall afford such manufacturer an opportunity to present data, views, and arguments to establish that there is no defect or failure to comply or that the alleged defect does not affect motor vehicle safety; and shall afford other interested persons an opportunity to present data, views, and arguments respecting the determination of the Secretary.

(b) If, after such presentations by the manufacturer and interested persons, the Secretary determines that such vehicle or item of replacement equipment does not comply with an applicable Federal motor vehicle safety standard, or contains a defect which relates to motor vehicle safety, the Secretary shall order the manufacturer (1) to furnish notification respecting such vehicle or item of replacement equipment to owners, purchasers, and dealers in accordance with section 1413 of this title, and (2) to remedy such defect or failure to comply in accordance with section 1414 of this title.

Traffic Act, Section 155 (15 U. S. C. § 1415):

Enforcement of notification and remedy orders—Civil actions; venue; change of venue; consolidation; expedition of proceedings

(a)(1) An action under section 1399(a) of this title to restrain a violation of an order issued under section 1412(b) of this title, or under section 1398 of this title to collect a civil penalty with respect to a violation of such an order, or any other civil action with respect to such an order, may be brought only

in the United States district court for the District of Columbia or the United States district court for a judicial district in the State of incorporation (if any) of the manufacturer to which the order applies; unless on motion of any party the court orders a change of venue to any other district court for good cause shown. All actions (including enforcement actions) brought with respect to the same order under section 1412(b) of this title shall be consolidated in an action in a single judicial district, in accordance with an order of the court in which the first such action is brought (or if such first action is transferred to another court, by order of such other court).

(2) The court shall expedite the disposition of any civil action to which this subsection applies.

Notification contents; liability of manufacturer

(b) If a civil action which relates to an order under section 1412(b) of this title, and to which subsection (a) of this section applies, has been commenced, the Secretary may order the manufacturer to issue a provisional notification which shall contain—

(A) a statement that the Secretary has determined that a defect which relates to motor vehicle safety, or failure to comply with a Federal motor vehicle safety standard, exists, and that the manufacturer is contesting such determination in a proceeding in a United States district court,

(B) a clear description of the Secretary's stated basis for his determination that there is such a defect or failure,

(C) the Secretary's evaluation of the risk to motor vehicle safety reasonably related to such defect or failure to comply,

(D) any measures which in the judgment of the Secretary are necessary to avoid an unreasonable hazard resulting from the defect or failure to comply,

(E) a statement that the manufacturer will cause such defect or failure to comply to be remedied without charge

pursuant to section 1414 of this title, but that this obligation of the manufacturer is conditioned on the outcome of the court proceeding, and

(F) such other matters as the Secretary may prescribe by regulation or in such order.

Issuance of notification under this subsection does not relieve the manufacturer of any liability for failing to issue notification required by an order under section 1412(b) of this title.

Civil actions for nonnotification of owners or purchasers; liability of manufacturer

(c)(1) If a manufacturer fails to notify owners or purchasers in accordance with section 1413(c) of this title within the period specified under section 1413(b) of this title, the court may hold him liable for a civil penalty with respect to such failure to notify, unless the manufacturer prevails in an action described in subsection (a) of this section or unless the court in such an action restrains the enforcement of such order (in which case he shall not be liable with respect to any period for which the effectiveness of the order was stayed). The court shall restrain the enforcement of such an order only if it determines, (A) that the failure to furnish notification is reasonable, and (B) that the manufacturer has demonstrated that he is likely to prevail on the merits.

(2) If a manufacturer fails to notify owners or purchasers as required by an order under subsection (b) of this section, the court may hold him liable for a civil penalty without regard to whether or not he prevails in an action (to which subsection (a) of this section applies) with respect to the validity of the order issued under section 1412(b) of this title.

Orders of Secretary against manufacturer; conditions for issuance

(d) If (i) a manufacturer fails within the period specified in section 1413(b) of this title to comply with an order under

section 1412(b) of this title to afford notification to owners and purchasers, (ii) a civil action to which subsection (a) of this section applies is commenced with respect to such order, and (iii) the Secretary prevails in such action, then the Secretary shall order the manufacturer—

(1) to afford notice (which notice may be combined with any notice required by an order under section 1412(b) of this title) to each owner, purchaser, and dealer described in section 1413(c) of this title of the outcome of the proceeding and containing such other information as the Secretary may require;

(2) to specify (in accordance with the second and third sentences of section 1414(b) of this title) the earliest date on which such defect or failure will be remedied without charge; and

(3) if notification was required under subsection (b) of this section, to reimburse such owner or purchaser for any reasonable and necessary expenses (not in excess of any amount specified in the order of the Secretary) which are incurred (A) by such owner or purchaser; (B) for the purpose of repairing the defect or failure to comply to which the order relates; and (C) during the period beginning on the date such notification under subsection (b) of this section was required to be issued and ending on the date such owner or purchaser receives notification pursuant to this subsection.

Supreme Court, U. S.
FILED
MAR 31 1976
MICHAEL RODAK, JR., CLERK

No. 75-870

In the Supreme Court of the United States

OCTOBER TERM, 1975

FORD MOTOR COMPANY, APPELLANT

v.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss the appeal or, in the alternative, to affirm the judgment of the district court.

On March 13, 1975, the Administrator of the National Highway Traffic Safety Administration ("NHTSA") notified appellant of his initial determination, following an investigation, that the front seat-back brackets on appellant's 1968 and 1969 Mustang and Cougar automobiles were subject to failure that could result in rearward collapse of the seat and consequent loss of vehicle control, accident, or injury

(J.S. App. 7A–8A). After appellant presented rebuttal arguments and data to NHTSA, the Administrator notified appellant on August 12, 1975, that the seat-back defect in the 1968 and 1969 Mustangs and Cougars "relates to motor vehicle safety" within the meaning of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, as amended, 15 U.S.C. 1381, *et seq.*, and ordered appellant to notify owners, purchasers, and dealers of the defect and to remedy the defect without charge (J.S. App. 8A).

Appellant commenced this action in the district court on August 18, 1975, challenging the constitutionality of those provisions of the Act that provide for civil penalties if a person fails to comply with an order directing notification and remedy of a safety-related defect. Appellant sought a temporary restraining order, preliminary and permanent injunctive relief, and the convocation of a three-judge court pursuant to 28 U.S.C. 2282 (J.S. App. 8A). A single district judge issued a temporary restraining order (*ibid.*), and a three-judge court was thereafter convened. At the hearing on appellant's motion for a preliminary injunction, the three-judge court continued the temporary restraint until further order (*ibid.*).

Appellant argued in the district court that the penalty provisions of the Act violate the Due Process Clause of the Fifth Amendment, contending that they impermissibly deter persons from seeking judicial review of the Administrator's orders by requiring a choice between complying with an order that may be erroneous and challenging the order in court

at the risk of incurring substantial civil penalties. Appellant claimed that it was entitled, under the Due Process Clause, to a "risk-free" opportunity to challenge the Administrator's order in court, and that the time for compliance with the order should begin to run only after a final judicial determination of that challenge.

The three-judge court, with one judge dissenting, rejected appellant's constitutional contentions, holding that the Act provides a constitutionally adequate procedure for tolling the accrual of civil penalties during the pendency of an action to enforce an order directing notification and remedy of a safety-related defect (J.S. App. 10A–25A). The court accordingly denied appellant's motion to enjoin the operation of the penalty provisions as unconstitutional (J.S. App. 1A, 25A). This appeal challenges that ruling.

In the meantime, the government had instituted a separate action in the district court to enforce the Administrator's order and to impose civil penalties for non-compliance. The three-judge court, "in the exercise of its pendent jurisdiction," issued "a preliminary restraint" enjoining the accrual of penalties for non-compliance with the Administrator's order "pending ruling by the District Court in the enforcement action on plaintiff's timely application in that action for a preliminary injunction" against accrual of penalties *pendente lite* (J.S. App. 25A).

On February 18, 1976, the district court in the enforcement action granted appellant's motion and preliminarily enjoined the government from imposing civil penalties on appellant on account of non-compli-

ance with the Administrator's order (App., *infra*, pp. 11–12).[1]

1. The appeal should be dismissed. Appellant has obtained, through the preliminary injunction in the enforcement action, essentially all the relief to which it would be entitled if it prevailed in the present action. Appellant "seeks only to restrain the operation of the civil penalty provisions of the Act" (J.S. 6), so that it may be assured "an adequate opportunity * * * for 'safely testing' the validity of the Administrator's order" (J.S. 15). The district court's preliminary injunction in the enforcement action has precisely that effect. Appellant is no longer "exposed to civil penalties in that action" (J.S. 5), and the allegedly coercive force of the challenged penalty provisions (see J.S. 6, 9, 17–19) has accordingly been vitiated.

Even if there remains a case or controversy within the meaning of Article III, the abstractness of the questions presented by the appeal makes this an inappropriate vehicle for constitutional adjudication. "Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present." *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588. See also *Rescue Army* v. *Municipal Court*, 331 U.S. 549; *DeBacker* v. *Brainard*, 396 U.S. 28. As in *Socialist Labor Party*, "the present

[1] The government's motion for reconsideration of the preliminary injunction was denied by the district court on March 11, 1976. The Solicitor General has determined not to take an interlocutory appeal from the order of preliminary relief.

posture of this case raises just such an obstacle" (406 U.S. at 589). There is no need to adjudicate the constitutional validity of the Act's penalty provisions at the instance of a litigant who has already obtained injunctive relief under the terms of those provisions and who therefore is no longer subject to the alleged deprivation of due process.[2]

[2] Appellant argues (J.S. 19–22) that the due process clause is also violated by the Act's provision authorizing the imposition of civil penalties for failure to comply with an administrative order directing a manufacturer to issue, pending completion of an enforcement action, "provisional notification" of a safety defect. 15 U.S.C. (Supp. IV) 1415(b). The Act does not provide a procedure for restraining the enforcement of such an order. But, since the Administrator has neither issued nor threatened to issue a provisional notification order in connection with the seat-back defect, the three-judge district court correctly concluded that "the provisional notification provision is not ripe for constitutional attack here" (J.S. App. 10A, n. 21). The court stated (*id.* at 11A; footnote omitted):

"In the absence of agency implementation of this section of the Act, we have no basis for determining its reach, let alone for measuring it against the command of the Constitution. The Administrator may view his authority to order provision[al] notification as limited to emergency situations—where the defect can be correlated with a significant incidence of highway accident and injury. The mere possibility that the Administrator might exercise that power in this case is too speculative to warrant judicial consideration at this juncture."

Although, as appellant argues, "the Administrator can order the provisional notification at any time" (J.S. 20), it does not follow that the prospect of a penalty for failure to comply with such an order has "a present, operative effect" (J.S. 21) of deterring litigation. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163–164. Not until the Administrator actually orders provisional notification will "the impact of the [penalty provision] * * * be felt immediately by those subject to it" (*id.* at 164). The time to challenge the provision is "in the context of a specific application," not "in the framework of the generalized challenge made here" (*ibid.*).

Appellant will suffer little if any "actual hardship" as a consequence of a dismissal. *Poe* v. *Ullman,* 367 U.S. 497, 509 (plurality opinion). In connection with the seat-back order, which formed the basis of the present constitutional attack on the statute, appellant is already free to litigate its validity without risk of civil penalty for non-compliance. If the Administrator of NHTSA issues notification and remedy orders in other cases, appellant can seek to restrain the enforcement of those orders, and thereby preclude the imposition of penalties *pendente lite,* either in an enforcement action brought by the government or in a pre-enforcement action brought by appellant (see J.S. App. 16A–18A), and on either statutory or constitutional grounds.[3]

2. Alternatively, the judgment of the district court should be affirmed. The Constitution does not prohibit the imposition of statutory civil penalties for non-compliance with an administrative order, if the accrual of penalties may effectively be stayed by a court of equity during the course of a judicial challenge to the administrative order. *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 226–227; *Yakus* v. *United States,* 321 U.S. 414, 438; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Williams,* 251 U.S. 63, 64–65.[4] As the district court stated (J.S. App. 11A–12A):

> Ford's contentions carry the infirmity of causing the Constitution to forbid Congress from placing barriers in the path of insubstantial litigation, embarked upon for delay and in the hope that an agency may settle for less protection for the public than the law contemplates. In our view, and our reading of the cases, the basic constitutional requirement is satisfied if the manufacturer has an opportunity to convince a court that its ground[s] for contesting the validity of the order are substantial, and the adequacy of that opportunity is established where it is made available before liability for noncompliance attaches.

The district court correctly concluded that the Act provides a constitutionally adequate procedure for tolling the accrual of penalties during litigation. Under 15 U.S.C. (Supp. IV) 1415(*c*)(1), the district court is authorized to restrain "the enforcement of * * * an [administrative] order"—and thereby to toll the accrual of civil penalties—"if it determines, (A) that the failure to furnish notification is reasonable, and (B) that the manuacturer has demonstrated that he is likely to prevail on the merits." As the district court stated, "the statute, fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's deter-

[3] In an action brought by the government to enforce a notification and remedy order with respect to a defect in windshield wiper systems on 1971–1973 Capri automobiles, appellant sought and obtained, under the terms of the statute, a preliminary injunction against enforcement of the administrative order *pendente lite*. *United States* v. *Ford Motor Co.*, D. D.C., Civil Action No. 76–0029, January 19, 1976. The result in that case, as in the seat-back case, is that appellant has been left free to challenge the lawfulness of the administrative order without risk of incurring the civil penalties whose constitutional validity is at issue here.

[4] Moreover, due process would permit the imposition of penalties, even in the absence of an opportunity to obtain a stay pending the conclusion of litigation, if that were "justified by compelling public interest." *Yakus* v. *United States*, *supra*, 321 U.S. at 442.

mination to obtain a preliminary injunction either in the Government's enforcement suit or, if the Government does not act promptly in bringing such a suit, in a pre-enforcement action" (J.S. App. 11A).

Appellant's contention that requiring the manufacturer to demonstrate a likelihood of success on the merits imposes an impermissibly heavy burden (J.S. 14–15) was correctly answered by the district court (J.S. App. 19A):

> That burden is in substance no different from the showing generally required of litigants seeking to restrain the operation of a statute or regulation which, it is claimed, invalidly restricts their actions. Ordinarily, the statute or regulation is presumed valid, and regardless of the injury claimed to flow from the statute's operation, a preliminary injunction will not issue unless probable success on the merits is demonstrated.

It is true that when the manufacturer is unable to demonstrate a likelihood of success on the merits, it will have to choose between compliance on the one hand and litigation subject to the risk of civil penalties on the other. But "Congress laid great stress on the importance of a 'timely remedy,' to give the driving public the quickest possible notice and remedy of safety-related defects" (J.S. App. 24A–25A, n. 46); "insofar as the statute does not give the manufacturer a 'free ride'—to litigate without any risk of penalties—it advances the important public policy, embodied in the 1974 amendments [to the Act], of a 'timely remedy', and prompt adjudication of controversies relating to highway and motor vehicle safety"

(J.S. App. 24A). "The public interest embraces measures to add a surcharge to deter frivolous litigation" (J.S. App. 25A).

It is therefore respectfully submitted that the appeal should be dismissed or, alternatively, that the judgment of the district court should be affirmed.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

APPENDIX

In the United States District Court for the District of Columbia

UNITED STATES OF AMERICA, PLAINTIFF

v.

FORD MOTOR COMPANY, DEFENDANT

Civil Action No. 75–1345, filed February 18, 1976, James F. Davey, Clerk

FINDINGS, CONCLUSIONS, AND ORDER

This case involves automobiles which have been manufactured, and on the road, for periods of from seven to eight-and-a-half years. There were a total of 725,000 automobiles, that up to the first of this year had traveled approximately 60 billion miles.

At this time, the evidence shows that, considering the number of cars, the mileage, and the number of years they have been in operation, there have been relatively few accidents, no deaths or serious bodily injury attributable to seat pin failures.

Based on that background, and the evidence as it exists today, this Court finds that defendant Ford Motor Company ("Ford") was ordered by the National Highway Traffic Safety Administration ("NHTSA") to furnish notification to car owners in this matter, without being afforded anything that approached a due process hearing; that under the circumstances and the evidence available at the time of the notice, the manufacturer acted reasonably in refusing to comply with the demand of notification.

The Court also finds that the manufacturer has a substantial basis for challenging the administrative directive, and the Court finds that Ford has met its burden of proof to show that it is likely to prevail on the merits in a trial *de novo*.

Now, Therefore, upon Ford's motion for preliminary injunction pursuant to Section 155(c)(1) of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (the "Act"), 15 U.S.C. § 1415(c)(1), the Court having heard and considered the evidence and arguments of counsel in support of and in opposition to Ford's motion, it is this 18th day of February, 1976,

Ordered that Ford's motion for preliminary injunction is granted, and that the plaintiff, its subordinates, employees, agents, and assigns, and each of them, are hereby enjoined from enforcing Sections 108, 109, 152, and 155 of the Act, 15 U.S.C. §§ 1397, 1398, 1412, and 1415, insofar as those sections purport to authorize the imposition of civil penalties upon Ford as a consequence of its failure to accede to the directive issued on or about August 12, 1975, by the Administrator of NHTSA which ordered Ford (i) to give notice to all owners of certain 1968 and 1969 model year Mustangs and Cougars of his final determination that the breakage of a seat back pivot arm hinge pin bracket constitutes a defect which relates to motor-vehicle safety within the meaning of the Act, and (ii) to offer to replace said seat pins free-of-charge to all present owners; *provided,* however, that nothing herein shall be deemed to restrain the plaintiff from prosecuting the instant civil action.

/s/ GEORGE L. HART, JR.
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-870

FORD MOTOR COMPANY,
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WILLIAM T. COLEMAN, JR.,
Secretary of Transportation, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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The Government seeks to convey the impression that the penalty scheme of the Traffic Act deters a manufacturer from seeking a court trial on the validity of the agency's directive only where the manufacturer's defense is frivolous. But under the district court's holding, even the manufacturer with substantial, non-frivolous grounds for going forward with such a trial remains fully exposed to the penalties for doing so—save only when it can prove at a preliminary hearing that it will ultimately prevail on the merits. The Government's motion to affirm fails to deal with this central point of Ford's appeal.

The Government's motion to dismiss should be denied because (i) resolution of the constitutional issue presented here by Ford affects all manufacturers' con-

tinuing relations with the National Highway Traffic Safety Administration in an important segment of the economy; and (ii) there is no better way than this case—indeed, there may be no *other* way—in which Ford can ever bring this extraordinary penalty scheme before this Court.

1. The Government's Motion to Affirm Should be Denied

The Government has no answer to Ford's points that in the proceeding before the administrative agency there is no sworn testimony, no right to cross-examination, and no subpoena power—all essential elements of due process. Likewise, the Government does not contest that the proceeding culminates in an administrative directive to the manufacturer, unsupported by any findings of fact or conclusions of law, to recall hundreds of thousands of vehicles and to replace component parts at enormous expense to the manufacturer; that the purported basis for any such directive is a legislative standard of "unreasonable risk," which after a decade remains unelucidated by statute, regulation, or administrative decision; and that the manufacturer can obtain a court hearing of any good-faith disagreement with the agency's directive only at the risk of incurring hundreds of thousands of dollars in civil penalties—some of which the statute would permit the Government to levy even if the manufacturer prevails on the merits in the district court enforcement proceeding.

The whole point and purpose of the penalty scheme is to "chill" the manufacturer—to deter it from exercising its right to the *only* due-process hearing it obtains under the statutory scheme (*see* J.S. App. 49A)

(Hart, J., dissenting). The Government has acknowledged as much: "It is the very threat of civil penalties, which may be assessed by the Court in an amount up to $800,000, which is designed to encourage manufacturers to comply with the Administrator's orders to notify with respect to and remedy safety related defects"—*i.e.*, to acquiesce without invoking their right to a trial *de novo,* which the statute ostensibly grants.[1]

In this Court, the Government points to the language of the majority below that "the statute, fairly read, permits the manufacturer who has a substantial, nonfrivolous challenge to the validity of the Administrator's determination to obtain a preliminary injunction" against enforcement of the penalties (J.S. App. 11A). The Government thereby seeks to slip past the core point of Ford's appeal: under the three-judge court's holding (as distinct from its language), whenever the enforcement court cannot determine on the preliminary injunction hearing that the manufacturer is likely to prevail at trial, the remedy which purportedly saves the constitutionality of the Act suddenly ceases to be available—even where the manufacturer's case is substantial and non-frivolous. The manufacturer can then proceed with the *de novo* trial only at the risk of incurring large penalties. In other words, the statutory grant of a fair "chance . . . for a test of a reasonable objections," required by the past decisions of this Court,[2] vanishes once the Government

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[1] Plaintiff's Motion for Stay of Preliminary Injunction Under 15 U.S.C. § 1415(e)(1) Pending Appeal, at 8, in *United States* v. *Ford Motor Co.*, C.A. No. 76-0029 (D.D.C. Jan. 28, 1976) ("windshield wiper" case). This statement of the statutory purpose is consistent with the legislative history. *See* J.A. 19 n.19.

[2] *E.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 654 (1950).

meets and passes the point of so-called "equipoise" in a summary preliminary injunction hearing (*see* J.S. 12-15). That constitutional deficiency cannot be squared with this Court's precedents upon which the two-judge majority below and the Solicitor General both purport to rely (*see* J.S.App. 13A; Motion at 6-7).

2. The Government's Motion to Dismiss Should be Denied

The Government carefully avoids asserting, but it indirectly intimates, that Ford's appeal is moot by reason of the statutory injunction granted in the Government's pending enforcement suit.[3] That suggestion is incorrect for three reasons.

First, Ford is subject to continuous regulation of the National Highway Traffic Safety Administration. The statutory penalty scheme has an undeniable impact every time Ford disagrees with the validity of an administrative recall directive. As the amicus brief of the Automobile Importers of America confirms, the ever-present threat of penalties colors all dealings between the agency and manufacturers subject to its regulation. Thus, "the underlying question persists and is agitated by the continuing activities and program" of the agency, which continually seeks to require recall and repair. *Cf. Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 179

[3] The Government states it will not appeal the order granting the statutory injunction (Motion at 4 n.1). We assume that the Government likewise concedes it cannot subsequently move to dissolve that injunction before the district court—a concession already made by Government counsel in another case involving appellant, *United States* v. *Ford Motor Co.,* C.A. No. 76-0029 (D.D.C.) ("windshield wiper" case). There, unlike here, the Government has appealed the enforcement Court's grant of the statutory injunction.

(1968); *see generally* R. Stern & E. Gressman, Supreme Court Practice, 588 (4th ed.). The "hardship" which Ford suffers because it is subject to the penalty scheme thus is "actual" and continuous, *cf. Poe* v. *Ullmann,* 367 U.S. 497, 509 (1961) (opinion of Frankfurter, J.); it permeates Ford's daily relations with the administrative agency. In sum, Ford's appeal presents a question central to the day-to-day administration of the Traffic Act; the issue presented here should be authoritatively resolved.

Second, Ford's appeal cannot in any event be moot, because the company's challenge to the provisional notification section remains alive (J.S. 19-22). The Government refrains from disavowing its intent to order such notification in the instant case. To the contrary, it agrees with Ford that "the Administrator can order the provisional notification at any time," and instead rests on the notion that he has not yet done so (Motion at 5 n.2). The Government, however, misapprehends the nature of Ford's challenge to this aspect of the penalty scheme: the Administrator's statutory power to order provisional notification overhangs the manufacturer before the enforcement suit is instituted (when the manufacturer is considering whether to acquiesce in a recall directive or to seek judicial review) and at every step of the legal proceedings thereafter. That threatened administrative action is part and parcel of the Traffic Act's effort to deter manufacturers from seeking judicial review of the Administrator's fiats.[4]

[4] The threat is not removed even if the manufacturer obtains the statutory injunction. Indeed, the Government recognizes that "the Act does not provide a procedure for restraining the enforcement" of a provisional notification order of the Administrator (Motion at 5 n.2).

Third, the Government suggests that Ford can always reassert its constitutional claim in subsequent litigation. But it is difficult to see how the matter could reach this Court in a posture in which the Solicitor General would not resist review on grounds of either mootness or lack of standing. In any future controversy in which the Administrator directs Ford to conduct a recall and repair, Ford will sue before a three-judge court to enjoin the Act's penalty scheme;[5] as in the present case, the Government will immediately commence a separate enforcement action against Ford to compel compliance with the Administrator's order, and Ford will then move in that action for the statutory injunction under Section 155(c)(1).[6] If the three-judge court follows the decision of the court below in the present case and if an injunction is granted in the Government's enforcement action, Ford's appeal to this Court will be in the same posture as in the instant proceeding, and the Government presumably will move to dismiss on the grounds asserted here.

If, on the other hand, Ford's application for the statutory injunction is denied in the Government's enforcement action, Ford's appeal from the judgment of the three-judge court will fare no better. Absent a stay *pendente lite,* Ford will either have to abandon its defense of the enforcement suit (in the face of the threatened penalty), in which event its three-judge court case will be asserted by the Solicitor General to be moot; or Ford will continue to assert its defense

[5] In the "windshield wiper" case, *supra,* Ford did not ask for a three-judge court because of the pendency of the instant action.

[6] The Government will no doubt argue that the outstanding judgment below, which the Government would leave intact, raises the bar of *res judicata* in any future three-judge court case.

on the merits in the enforcement action, in which event the Solicitor General will urge that Ford lacks standing to press its constitutional claim in this Court because it has not been deterred by the penalty scheme from defending itself.

By the same token, Ford cannot look to a petition for certiorari from a Court of Appeals' affirmance of a final judgment by a district court awarding penalties. In such circumstances, the Government will again contend that Ford lacks standing to present the constitutional claim because it was not deterred by the penalty scheme from defending the enforcement suit.

In sum, for all practical purposes, the Government would foreclose Ford from ever obtaining a hearing in this Court on appellant's basic constitutional challenge to the extraordinary penalty scheme imposed by the Traffic Act, whether or not Ford contests an administrative determination, and whether or not appellant obtains the statutory injunction in the enforcement suit. Ford's present appeal thus presents a constitutional challenge to one in an inevitable series of administrative orders "capable of repetition, yet evading review. . . ." *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911).

The Government concedes that the Court has jurisdiction to hear Ford's appeal, but urges the Court to decline to exercise that jurisdiction on the theory that "the abstractness of the questions presented . . . makes this an inappropriate vehicle for constitutional adjudication" (Motion at 4). Even on the debatable assumption that the Court may dismiss on discretionary grounds an otherwise properly presented appeal from the judgment of a properly convened three-judge fed-

eral district court, the Government's contention is unpersuasive. There is nothing abstract to Ford's case. Appellant contends that the penalty scheme of the Traffic Act unlawfully coerces it to forgo its right to judicial review of an administrative recall and repair directive—a directive issued without adherence to the most elementary precepts of due process (*see* J.S. 7, 23). The three-judge district court did not deem this clearcut, precise constitutional issue too "abstract" for judgment, and the Government raised no such objection below. The constitutional issues at stake are "presented with the clarity needed for effective adjudication" as surely in this Court as they were below. *Cf. Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 589 n.2 (1972). Moreover, no further proceeding below, whether in this case or in any other action arising under the Act, could further sharpen the "usual considerations of timeliness and maturity, of concreteness, definiteness, certainty, and of adversity of interests affected" as they already exist now. *Cf. Rescue Army* v. *Municipal Court*, 331 U.S. 549, 573 (1947).[7]

[7] The cases relied upon by the Government (Motion at 4) lend no support to its position. In *Socialist Labor Party, supra*, "all issues litigated below [had] . . . become moot except for one that received scant attention in appellants' complaint and was treated not at all in the affidavits filed in support of the cross-motion for summary judgment." 406 U.S., at 589. Moreover, as to the one issue—the requirement of an executed "loyalty oath" as a precondition to placement of candidates' names on the ballot—"appellants [had] . . . apparently signed the oath at previous times, and so far as this record shows they have suffered no injury as a result." *Id.*, at 588. Both *Rescue Army, supra*, and *DeBacker* v. *Brainard*, 396 U.S. 28 (1969), arose from state courts, not three-judge federal district courts. In the former case, that key difference generated a "serious problem of [state statutory] construction relating . . . to the terms of the questioned legislation [and] . . . to its interpretation by the state courts," 331 U.S., at 584; in the latter, the appeal essentially no longer presented a substantial federal question in light of intervening decisions which denied retroactive effect to the constitutional doctrines there involved, 396 U.S., at 30.

For the foregoing reasons, Ford Motor Company respectfully submits that the Government's motion to dismiss or affirm should be denied, and that the Court should note jurisdiction of Ford's appeal.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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Ward's Automotive Reports, Vol. 51, No. 2, January 12, 1976 . . . . . 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-870

FORD MOTOR COMPANY,

Appellant,

v.

WILLIAM T. COLEMAN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC., IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTEREST OF *AMICUS CURIAE*, AUTOMOBILE IMPORTERS OF AMERICA, INC,

Automobile Importers of America, Inc. (AIA) is a trade association organized as a non-profit District of Columbia corporation. Its Members import into,[1] or

[1] Alfa Romeo, Inc.
BMW of North America, Inc.

[Footnote continued]

manufacture for export to,[2] the United States the following makes of vehicles: Alfa Romeo, Alfetta, Arrow, Austin, BMW, Bentley, Citroen, Colt, Datsun, Fiat, Honda, Jaguar, Jensen, Lancia, Lotus, MG, Mazda, Peugeot, Renault, Rolls-Royce, Saab, Subaru, Toyota, Triumph and Volvo. The sales volumes of these vehicles range from the highest among imports to those too low to be listed among the top twenty-one imports.[3] Associate Members[4] of AIA are manufacturers of parts for

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British Leyland Motors Inc.
Citroen Cars Corporation
Fiat Motor Company, Inc.
American Honda Motor Co., Inc.
Mazda Motors of America, Inc.
Nissan Motor Corp. in U.S.A.
Peugeot, Inc.
Renault, Inc.
Rolls-Royce Motors Inc.
Saab-Scania of America, Inc.
Subaru of America, Inc.
Toyota Motor Sales, U.S.A., Inc.
Volvo of America Corporation

Except for Subaru of America, Inc., these companies are wholly owned subsidiaries of the manufacturers of the vehicles they import.

2 Jensen Motors Ltd.
Lotus Cars Limited
Mitsubishi Motors Corporation

[3] Ward's Automotive Reports, Vol. 51, No. 2 (January 12, 1976), p. 10.

4 Bridgestone Tire Company of America, Inc.
Joseph Lucas North America Inc.
Michelin Tire Corporation
Nisonger Corporation
Pirelli Tire Corporation
Semperit of America, Inc.
Toyo Tire (U.S.A.) Corporation
Yokohama Rubber Co., Ltd.

imported and domestic motor vehicles whose products run the full range of parts from the smallest light bulb to tires.

All AIA Members and Associate Members are subject to the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. §§1391-1431) (Traffic Act) and regulations promulgated thereunder by the National Highway Traffic Safety Administration (the agency). The Traffic Act defines "manufacturer" as including importers (15 U.S.C. §1391(5)). While AIA Members and Associate Members are subject to the same provisions (15 U.S.C. §§1397, 1398, 1412 and 1415(c)) whose constitutionality is raised by Appellant Ford Motor Company (Ford), the risk of the two $800,000 penalties and costs of provisional notification is of much greater significance for them. Their respective shares of the market are far smaller than that of Ford, and the threatened penalties and costs are therefore far larger on a per unit basis.[5]

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[5] Ford's U.S. market share of passenger cars in 1975 was 22.95% whereas the largest share of an AIA Member was 3.3% (Toyota) and each of the four smallest shares of AIA Members was less than .006%, the smallest of those reported. Ward's Automotive Reports, *id.* pp. 10, 13.

THE FEDERAL CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL.

THE ENORMOUS RISKS IMPOSED BY THE TRAFFIC ACT UPON A MANUFACTURER SEEKING A DUE PROCESS HEARING CONCERNING AN ALLEGED SAFETY-RELATED DEFECT EFFECTIVELY DENY SUCH A HEARING.

A. The Risk of Incurring a Penalty of up to $800,000 in the Event of an Adverse Judicial Decision and the Risks of Incurring Either the Cost of a Provisional Notification or a Penalty of up to $800,000 for Failure to Notify, Effectively Deny Manufacturers a Due Process Hearing.

Initially, it is important to note the distinction between cases involving safety-related defects,[6] at issue herein, and cases involving compliance with the agency's safety standards, not at issue herein. Under the Traffic Act, compliance cases involve the failure to meet what the statute requires to be specific, objective equipment or motor vehicle standards whose performance is measured by objective tests. *Chrysler Corp. v. Dept. of Transportation,* 472 F.2d 659, 675 (6th Cir. 1972). Thus, the manufacturer should always be able to determine – *in advance* of offering the equipment or motor vehicle for sale – what is required and should have a precise test available as to whether it meets those requirements.

Defect cases are quite the opposite. There is not even a working definition available as to what is a safety-related defect, much less any objective test for determining in advance of post-sale agency review whether there is a

[6] The statutory scheme for defect cases and how it was applied herein are set forth in Ford's Jurisdictional Statement (Juris. State.) 6-10.

defect. Obviously, with no criteria, there can be good faith differences of opinion as to whether in a given case there is a safety-related defect. It is the fair resolution of those differences with which we are here concerned.

AIA submits that there cannot be a fair resolution of those differences in defect cases without the manufacturer's being able to fairly present its side and to respond to the agency's charges in a due process hearing, free from threats of enormous penalities and costs merely for seeking the due process hearing. To threaten to add extraordinary costs and a penalty against a manufacturer in defect cases would be like threatening to impose punitive damages in a simple negligence case where the standards of what constitutes negligence in a given factual situation cannot be known in advance of the due process hearing.

Up until this time, the only companies to judicially challenge an agency order to conduct a safety-related defect notification or recall campaign have been the two behemoths of the motor vehicle industry, General Motors Corporation (GM) (four separate agency defect orders were involved in: *United States v. General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975); *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-277; *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-0049 and *United States v. General Motors Corp.,* D.D.C., Civ. No. 75-0050 and Ford (two separate agency defect orders were involved in *United States v. Ford Motor Company,* D.D.C., Civ. No. 76-0046 and herein). Only these two companies have faced the risk of a penalty of up to $800,000 for noncompliance with the agency order if the court finds a safety-related defect exists, and the additional risk of either another penalty of up to $800,000 or the cost of a provisional notification.

But the provisions of the Traffic Act establishing the two $800,000 civil penalities and the provisional notification procedure hit the smaller companies harder, for the threatened costs are relatively fixed[7] and represent a much greater part of the cost of doing business in the United States for the smaller companies.[8] Until now, the smaller companies have been, at best, a footnote in some other company's case.[9] Thus, even more so than for GM and Ford, the effect of these provisions is to deny the smaller companies any real opportunity for a due process hearing.[10]

The present situation simply overwhelms the smaller companies. For example, contract the 625,000 vehicles involved in this case (Juris. State. 7) with a claimed defect in 800 replacement brake hoses retailing for perhaps $3.00 each. The penalty faced by the brake hose manufacturer, should it seek a due process hearing and

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[7]The maximum $800,000 penalty is quickly reached since the penalty accrues at the rate of $1000 per vehicle or item of equipment involved.

[8]By smaller companies, we mean substantially smaller than GM and Ford by any standard, including total assets, net capital, total sales in dollars or motor vehicle sales in units. Smaller companies include not only AIA companies but domestic companies like Checker, Excalibur, Avanti, and a host of truck manufacturers as well as parts manufacturers.

[9]*E.g.*, Juris. State. 16.

[10]Even Judge Hart in his dissent below seems to have overlooked the plight of the smaller companies when he stated:

> "The 'fair price of adventure' is too high, and the argument that *automobile manufacturers may be able to afford such penalties* does not overcome the inevitably chilling effect which the penalty provisions instill." (Emphasis added.) Juris. State. Appendix (App.) 49-A.

lose, is up to $800,000 on goods retailing for $2400. In addition, it faces the possibility of a provisional notification order. If that order were issued and the manufacturer refused to comply with the order, it would face another penalty of up to $800,000, whether or not the court found that the brake hoses actually contained a safety-related defect. If it complied with the provisional notification order, the cost of preparing, printing and mailing the notices alone would surely exceed the $2400 retail value. There is, of course, only one practical thing for the brake hose manufacturer to do: comply with the agency recall order, whatever its merits, and replace the questioned hoses.

This example is extreme. But less extreme and very real are the same problems for the $40 tire manufacturer, the low-volume $3000 automobile manufacturer, even the low-volume $10,000 luxury car manufacturer. In each case, the risks are simply too great to take, resulting in compliance with an order of questionable validity. It is no answer, therefore, for District Courts to say to the smaller companies that

> "... it is hardly reasonable to argue that General Motors, one of the largest corporations in the world, would forego judicial review simply because there is a possibility that if it loses it may be assessed anywhere from one dollar to four-hundred thousand dollars." *United States v. General Motors Corp.* 385 F. Supp. 598, 604 (D.D.C. 1974)

or

> "Even in gross, the $800,000 figure must be taken in conjunction with the fact that the class which will be affected – manufacturers or assemblers of motor vehicles or motor vehicle equipment – will not be denied access to the courts. It may well be within

the range of the cost of litigation for such challenges." App. 22-A

This result, of limiting if not foreclosing due process proceedings, is no accident. As noted by Judge Hart in his dissent:

> "The legislative history of the amendments indicates that the absence of due process elements at the agency level was no accident. Indeed, the Conference Report on the bill which became the 1974 amendments rejected the Senate's proposal which would have required the Secretary of Transportation to provide the manufacturer with 'a statement of his reasons and basis for the findings of a safety-related defect' and would have granted the manufacturer a limited right of a cross-examination. H.R. Rep. No. 93-1452, 93rd Cong., 2d Sess., at 24 (1974)." App. 35-A.

Even the District Court majority was forced to concede as much while making an effort to make a virtue of this vice by arguing that it was needed in order to deter "frivolous litigation" and to provide "prompt corrective action" for the alleged defects. App. 25-A. Neither supposed need justifies the drastic effect of deterring nonfrivolous, indeed, meritorious, litigation. Moreover, the effects of virtually foreclosing even meritorious litigation will necessarily include encouraging the agency to ignore the manufacturer's rights and press unjustified recalls at the expense first of the manufacturer, but ultimately of the consumer. If "prompt corrective action" is appropriate, the mechanism exists since the agency can set the date for compliance with its order (15 U.S.C. §1413(b)) and promptly seek judicial enforcement if compliance is not forthcoming. These matters are wholly within the unchallenged powers of the

agency and the courts. In short, AIA submits that it would be better to put the burden on the agency should the feared extraordinary case arise, rather than to consciously and consistently deny manufacturers due process.

The public confirmation of what had been informally impressed upon the smaller companies did not go unnoticed, namely the agency's testimony before Congress that "whenever an action is forwarded to the Justice Department to collect a civil penalty the maximum authorized by law is sought." Hearings Before the House Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce on H.R. 7505, 93d Cong., 1st Sess., at p. 388 (1973). Smaller companies are not faced with a *possible* $800,000 claim, they are faced with a *certain* $800,000 claim – the same as GM and Ford. At best, the smaller companies are left to speculate on what the judicially established penalty might be. It can be no surprise that in the nine years since enactment of the Traffic Act, only GM and Ford have failed to acquiesce in the agency's recall orders, even though it was barely a year ago that the maximum penalty was raised to $800,000 from $400,000.

Another evil in this policy of systematically limiting judicial scrutiny of the agency's recall orders is that as the recall campaigns are ordered and carried out by manufacturers, a body of administrative precedent is established. The effect of all unchallenged agency recall orders – some of which are unchallenged only out of fear of enormous penalties or the acceptance of the lesser of evils – is compounded as the unchallenged recall orders encourage similar and even less meritorious agency recall orders in the future.

As emphasized by Judge Hart (App. 46-A):

> "[T]he right to a judicial review must be substantial, adequate and safely available – but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. *Wadley Southern Ry. v. Georgia*, 235 U.S. 651, 661 (1915)."

If these words of this Court are to be any more than mere words, then 15 U.S.C. §§1397, 1398, 1412 and 1415(c) as applied to safety-related defect cases, are unconstitutional as violating the Fifth Amendment.

B. The Provisional Notification, Standing Along, on its Face and As Applied, Is Repugnant to the Constitution.

However unfair may be the $800,000 penalty facing a manufacturer for testing the agency's recall order, it cannot compare for repugnancy to the Constitution with the "provisional notification" provisions. While the former at least permits a prevailing manufacturer to escape the fact, if not the threat, of the penalty, the provisional notification provisions do not. Even if a manufacturer eventually prevails, it faces a penalty if it fails to comply with an agency order to send out the provisional notification at the manufacturer's own expense.

The litany of horrors arising out of the provisional notification procedure is almost incredible:

- after a non-due process proceeding, the agency enters a recall order and, should the manufacturer demand a due process proceeding, the agency can, based on its own non-due process order, require

  the manufacturer to expend large amounts of its own funds on a notice to owners emphasizing that non-due process order;
- there is no judicial review permitted on the validity or propriety of the provisional notification order; thus, never a due process proceeding on the order;
- for failure to comply with the provisional notification order, the manufacturer faces an $800,000 penalty even if it wins on the merits of the defect controversy;
- if the manufacturer complies with the provisional notice order –
  - it must disparage its own goods to its own customers – even if not true (15 U.S.C. §1415 (b) (A) - (D))
  - it may only state the agency's side of the controversy (15 U.S.C. §1415(b)(B) and (C); agency proposed amendments to 49 C.F.R. Part 577, new §§577.6(b), 577-8, 40 *Fed. Reg.* 19651, 19655, 19656 (May 6, 1975)), an apparent violation of the Constitution's First Amendment freedom of speech provision; and
  - it must imply that it is appealing a valid order and has some burden to overcome (15 U.S.C. §1415(b)(E)), when in fact it is seeking its first opportunity for a due process hearing where the agency has the burden of proof.

In practical effect, the manufacturer must decide whether it is worth the risk of the $800,000 penalty to avoid product self-disparagement and the considerable cost of the provisional notice. For the smaller company, the risk of the enormous penalty virtually forces compliance. Therefore, in deciding whether or not to seek a due process proceeding on the basic recall order, the smaller

company must take into account the adverse impact of the cost of any provisional notification (which, as noted above, might be far more than the cost of repair or replacement) and the adverse effect of the agency-ordered and non-judicially reviewable self-disparagement. All of which has a most "chilling effect," to say the least, on whether to seek a due process hearing.

C. The District Court Construction of the Provisions in Question Fails to Bring Them Within Constitutional Limits.

With regard to the provisional notification issue, the District Court declined to try to rehabilitate this procedure, preferring instead to avoid the issue by declaring that it was not ripe for decision because the agency has not actually ordered a provisional notification in this case. App. 10-A. However, at the time Ford filed its suit herein, neither had the agency sought the $800,000 penalty.

The chilling effect of the provisional notification scheme remains severe as a threat, if not yet a fact, to Ford. If this issue is not now ruled upon, it will continue as that threat for Ford and all other companies, and apparently the only way it could ever be challenged would be for some company to risk the $800,000 penalty for failure to comply – a risk certainly no smaller company could afford to take.

It is noteworthy that Judge Hart in his dissent found no difficulty seeing the issue ripe for consideration (App. 36-A) and recognizing many of its shortcomings:

> "The provisional notification portion of the Act as amended cannot stand insofar as it summarily assigns civil penalties for failure to comply based on an administrative determination arrived at without procedural due process safeguards for the manufacturer; prior to judicial testing of the validity of the agency determination; and without regard for the ultimate disposition of the case. Therefore, I would find the provision unconstitutional as contravening the due process clause of the Fifth Amendment." App. 41-A.

With regard to the $800,000 penalty for failure to comply with an agency recall order, the District Court sought to bring it within Constitutional limits by (1) holding that a hearing on a motion for a preliminary injunction against enforcement would suffice for the requisite due process hearing, and (2) creating a unique burden of proof theory ereby the moving party for a preliminary injunction need only show that the evidence is in equipoise.

The District Court's first point, using the preliminary injunction as a "quickie" due process fulfillment, fails to bring the penalty within constitutional limits. Despite the District Court's repeated implication that seeking the preliminary injunction would be risk-free (App. 18-A, 21-A, 13-A), the fact is, it could not be. If a manufacturer unsuccessfully sought the preliminary injunction and then complied with the agency recall order rather than proceed to a full hearing, it would still be liable for the penalty because, in all likelihood, it would have failed to issue the recall order within the time specified by the agency.[11] 15 U.S.C. §1415(c)(1) plainly states that the

[11] It is no answer to suggest that the agency would probably act reasonably and not seek a penalty in such circumstances for, first, it is the *threat* which chills the invocation of judicial proceedings and, second, there is no reason to believe the agency would act any more reasonably than when the agency publicly announced that it would always seek the maximum penalty regardless of the size of the manufacturer involved or any extenuating circumstances surrounding the alleged defect case. See p. 9, *supra*.

penalty abates only "with respect to any period for which the effectiveness of the order was stayed." If there is no stay, there is no abatement. Thus, the District Court's theory fails to meet its own test that:

> "... the basic constitutional requirement is satisfied if the manufacturer has an opportunity to convince a court that its ground [sic] for contesting the validity of the order are substantial, and the adequacy of that opportunity is established where it is made available *before liability for noncompliance attaches.*" (Emphasis added.) App. 12-A.

As shown, the preliminary injunction procedure is still not an opportunity for a due process hearing "before liability for noncompliance attaches."

The District Court's equipoise of evidence theory is by its own admission "novel in formulation" (App. 19-A). Judge Hart deals with the theory more harshly:

> "... [the equipoise theory] runs afoul of the plain and accepted meaning of burden of proof and the specific words of the statute. The law is and has always been that where the proof is in equipoise the party who has the burden of proof has not met that burden and cannot prevail. Nor do the words of the statute provide that all the manufacturer must only mount such evidence as meets the government's submission." App. 32-A.

Little can be added to Judge Hart's statement except to note the statutory language he refers:

> "The court shall restrain the enforcement of such an order only if it determines ... that the manufacturer has demonstrated that he is likely to prevail on the merits." 15 U.S.C. §1415(c)(1).

CONCLUSION

AIA agrees with the District Court's statement that:

> "... the Constitution is offended when the penalty system is of such a nature as to create a virtual roadblock to judicial review." App. 14-A.

We submit, however, that we have shown how the penalty and provisional notification provisions do "create a virtual roadblock to judicial review" for, at least, the smaller companies. Accordingly, AIA respectfully submits that the federal questions presented in this case are substantial and warrant this Court's plenary review.

Respectfully submitted,

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